

## A DIFFERENT CLASS OF CARE: THE BENEFITS CRISIS AND LOW-WAGE WORKERS

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*When compared to other developed nations, the United States fares poorly with regard to benefits for workers. While the situation is grim for most U.S. workers, it is worse for low-wage workers. Data show a significant benefits gap between low-wage and high-wage in terms of flexible work arrangements (FWAs), paid leave, pensions, and employer-sponsored health-care insurance, among other things. This gap exists notwithstanding the fact that FWAs and employment benefits produce positive returns for employees, employers, and society in general. Despite these returns, this Article contends that employers will be loath to extend FWAs and greater employment benefits to low-wage workers due to (1) concerns about costs, (2) a surplus of low-wage workers in the labor market, (3) negative perceptions of the skill of low-wage workers and the value of low-wage work, (4) other class-based stereotypes and biases, and (5) structural impediments in some low-wage jobs. Given the decline of unions and limited legislative action to date, the Article maintains that low-wage workers are in a “different class of care” with little hope for meaningful change on the horizon.*

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\* Professor of Law, *Duke University School of Law*. Many thanks to Camille Gear Rich for her input on the title to this Article. For their insightful feedback, I would also like to thank Margaret Hu, Wendy Greene, Suzette Malveaux, and attendees at the Tenth Annual Lutie Lytle Writing Workshop (Iowa City, Iowa, July 2016), as well as Susan Bisom-Rapp and participants at the XIV International Conference in Commemoration of Professor Marco Biagi (Modena, Italy, March 2016). And last, but certainly not least, for their contributions to this work, I would like to thank my colleague, Lawrence Zelenak, the terrific editors at the *American University Law Review*, and my amazing research assistants, Matthew Craig, Kevin Zhao, and Christian Harris.

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## INTRODUCTION

In June 2015, Virgin announced an expansion of its parental leave policy. Working parents at Virgin, regardless of their gender, would receive a year of paid parental leave in the first year following the birth or adoption of a child.<sup>1</sup> In making the announcement, Virgin's founder, Richard Branson, stated,

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1. Richard Branson, *Why Virgin Is Extending Shared Parental Leave*, VIRGIN (June 10, 2015), <https://www.virgin.com/richard-branson/why-virgin-is-extending-shared-parental-leave>.

As a father and now a grandfather to three wonderful grandchildren, I know how magical the first year of a child's life is but also how much hard work it takes. Being able to spend as much time as possible with your loved ones is absolutely vital, especially early on.<sup>2</sup>

In August 2015, Netflix also announced an expansion of its parental leave policy: new parents on its payroll would receive up to a year of paid leave.<sup>3</sup> Netflix's policy allows parents to take leave, to return to work, and to go back on leave as necessary.<sup>4</sup> In making the announcement, Netflix stated, "We want employees to have the flexibility and confidence to balance the needs of their growing families without worrying about work or finances."<sup>5</sup>

Virgin and Netflix joined several other high profile companies that were already known for offering generous benefits,<sup>6</sup> and their

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2. *Id.*

3. Netflix made the announcement on its blog, and many mainstream media outlets viewed it as a harbinger of things to come from other tech giants. *See, e.g.*, Associated Press, *Netflix Offers New Parents One Year of Paid Leave*, WALL ST. J. (Aug. 5, 2015, 1:34 PM), <http://www.wsj.com/articles/netflix-offers-new-parents-one-year-of-paid-leave-1438735806>.

4. *Id.*

5. *Id.*

6. The technology industry is particularly well-known for offering generous benefits. *See, e.g.*, Rachel Gillett, *Facebook Is at the Forefront of a Radical Workplace Shift—and Every Business in America Should Take Notice*, BUS. INSIDER (Aug. 19, 2015, 11:35 AM), <http://www.businessinsider.com/facebook-parental-leave-policy-2015-8> (describing Facebook's policy of providing "four months of paid leave, regardless of gender or birthing means, to new parents within the first year of birth or placement [for adoption]"); Kathleen Hogan, *The Employee Experience at Microsoft: Aligning Benefits to Our Culture*, MICROSOFT (Aug. 5, 2015), <http://blogs.microsoft.com/blog/2015/08/05/the-employee-experience-at-microsoft-aligning-benefits-to-our-culture> (summarizing Microsoft's new parental leave policy, which includes eight weeks of paid maternity leave for new mothers in addition to twelve weeks of parental leave for all parents, four of which are paid and eight of which are unpaid); *Vodafone Offers Worldwide Maternity Pay Minimum*, GUARDIAN (Mar. 6, 2015, 8:11 AM), <http://www.theguardian.com/business/2015/mar/06/vodafone-offers-worldwide-maternity-minimum> (summarizing Vodafone's expanded maternity leave policy, which "offer[s] women 16 weeks of fully paid maternity leave, plus full pay for a 30-hour [work] week for the first six months after their return to work"). Companies in other industries have also extended their parental benefits. *See, e.g.*, *Blackstone Extends Maternity Leave to 16 Weeks*, BLACKSTONE (Apr. 23, 2015), <https://www.blackstone.com/careers/blackstone-women/article/2015/04/23/blackstone-extends-maternity-leave-to-16-weeks> (announcing that investment firm Blackstone is extending its maternity leave policy "to 16 weeks in support of the many exceptional women at the firm and those [it] hope[s] to attract"); Peter Fasolo, *J&J and the 21st Century Working Family*, JOHNSON & JOHNSON (Apr. 29, 2015), <http://www.blogjn.com/2015/04/jj-and-the-21st-century-working-family>

announcements were followed by news releases from other companies that were either trying to keep up or vying for the title of most family friendly.<sup>7</sup> What is often missing in these announcements, and the ensuing press coverage, is that these benefits only go to a certain class of employees.<sup>8</sup> For example, Netflix's policy initially covered only its "salaried streaming employees."<sup>9</sup> It did not cover employees in Netflix's DVD distribution centers, who are generally lower-paid, hourly workers.<sup>10</sup> This distinction reportedly left out 400–500 of the company's roughly 2300 workers,<sup>11</sup> who would continue to receive about twelve weeks of paid maternity and paternity leave.<sup>12</sup> Notably,

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(announcing Johnson & Johnson's upgraded parental leave policy, which allows all parents to take eight weeks of paid leave in the first year following their child's birth or adoption; new mothers can take a total of up to seventeen weeks of paid leave); *Nestlé Launches Maternity Protection Policy for Employees Worldwide*, NESTLÉ (June 26, 2015), <http://www.nestle.com/media/news/nestle-maternity-protection-policy-for-employees-worldwide> (announcing Nestlé's new parental leave policy, which gives all primary caregivers, including both male and female employees, "a minimum of 14 weeks paid maternity leave and the right to extend [that] leave up to six months").

7. For example, just days after Netflix's announcement, Microsoft blogged that it was also expanding its parental leave policy to include additional paid maternity and paternity leave for all new parents. Hogan, *supra* note 6.

8. See Emily Peck, *Not All Netflix Workers Will Get "Unlimited" Parental Leave*, HUFFINGTON POST (Aug. 6, 2015, 1:24 PM), [http://www.huffingtonpost.com/entry/certain-netflix-workers-dont-get-new-unlimited-parental-leave\\_55c38156e4b0f1cbf1e3edf6](http://www.huffingtonpost.com/entry/certain-netflix-workers-dont-get-new-unlimited-parental-leave_55c38156e4b0f1cbf1e3edf6) (highlighting that Netflix's new parental leave policy only applies to some employees; workers in the DVD division are not covered).

9. Sam Sanders, *Netflix's New, Generous Parental Leave Policy Leaves Some Employees out*, NPR (Aug. 6, 2015, 5:34 PM), <http://www.npr.org/sections/thetwo-way/2015/08/06/430069888/netflixs-new-generous-parental-leave-policy-leaves-some-employees-out>.

10. *Id.*

11. *Id.*; see also Peck, *supra* note 8; Sam Sanders, *Netflix Still Facing Questions over Its New Parental Leave Policy*, NPR (Aug. 10, 2015, 6:47 PM), <http://www.npr.org/sections/thetwo-way/2015/08/10/431273033/netflix-still-facing-questions-over-its-new-parental-leave-policy>.

12. Emily Peck, *Under Fire, Netflix Defends Lopsided Parental Leave Policy*, HUFFINGTON POST (Sept. 2, 2015, 1:39 PM), [http://www.huffingtonpost.com/entry/netflix-parental-leave-policy\\_us\\_55e7239ce4b0aec9f3556d1d](http://www.huffingtonpost.com/entry/netflix-parental-leave-policy_us_55e7239ce4b0aec9f3556d1d). In December 2015, after being criticized for its "lopsided" leave policy, Netflix announced that it would give its hourly workers twelve to sixteen weeks of paid parental leave with the amount depending upon the division within which a worker is located. See *id.* (discussing criticism of Netflix's policy by activist groups); Davey Alba, *Netflix Adds Hourly Workers to Its Generous Parental Leave Plan*, WIRED (Dec. 9, 2015, 5:45 PM), <https://www.wired.com/2015/12/netflix-adds-hourly-workers-to-its-generous-parental-leave-plan> (noting that "hourly employees in [Netflix's] DVD-by-mail division will get up to 12 weeks of paid leave; customer service 14 weeks; and hourly streaming-division employees 16 weeks"); see also Rachel Gillett, *Netflix Just Stepped up*

Virgin's policy is even more limited, covering only Virgin Management, a small investment and brand licensing division that employs fewer than 140 of Virgin's 50,000 employees.<sup>13</sup> Virgin's policy thus covers some high-wage employees and omits all of its low-wage workers.

Virgin and Netflix are not unique. Across the labor market, high-wage workers tend to receive greater employment benefits than low-wage workers.<sup>14</sup> These benefits include not only parental leave but also sick leave, flexible work arrangements ("FWAs"), pensions, and employer-sponsored health-care plans, among other things.<sup>15</sup> The benefits gap between high- and low-wage workers exists despite the fact that family-friendly<sup>16</sup> policies have been shown to produce positive returns for employers in terms of employee recruitment, retention, and productivity.<sup>17</sup> These policies have also helped high-wage working parents balance their familial and employment responsibilities. Indeed, as the Virgin and Netflix announcements illustrate, a primary justification for, and impetus behind, the creation of family-friendly policies has been a desire to assist working parents in navigating these—at times conflicting—obligations.<sup>18</sup> This balance has been particularly

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*Its Leave Policy—Again*, BUS. INSIDER (Dec. 9, 2015, 4:07 PM), <http://www.businessinsider.com/netflix-offers-more-paid-leave-to-hourly-employees>. Thus, Netflix's policy continues to treat its salaried and hourly workers differently—just less so.

13. Susan Adams, *Virgin's New Paternity Leave Policy: It's Not Quite as Great as the Hype*, FORBES (June 12, 2015, 6:29 PM), <http://www.forbes.com/sites/susanadams/2015/06/12/virgin-new-paternity-leave-policy-is-it-worth-the-hype>.

14. See *infra* Part II for discussion of these disparities.

15. See, e.g., HEATHER BOUSHEY ET AL., CTR. FOR ECON. POLICY & RESEARCH, UNDERSTANDING LOW-WAGE WORK IN THE UNITED STATES 1 (2007); ECONOMIC REPORT TO THE PRESIDENT, ANNUAL REPORT OF THE COUNCIL OF ECONOMIC ADVISORS 178–84 (2015), [https://obamawhitehouse.archives.gov/sites/default/files/docs/cea\\_2015\\_erp\\_complete.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_2015_erp_complete.pdf).

16. I generally prefer to use the phrase "work-life" benefits instead of "family-friendly" benefits as the former captures the fact that workers are not monolithic (not all are parents or have spouses) and have diverse, yet nonetheless important, obligations that may conflict with work. For additional discussion of this point, see Trina Jones, *Single and Childfree! Reassessing Parental and Marital Status Discrimination*, 46 ARIZ. ST. L.J. 1253 (2014). I use "family friendly" in this Article, however, to highlight the fact that many people seek to justify many work-life benefits by pointing to the importance of promoting healthy families.

17. See COUNCIL OF ECON. ADVISORS, EXEC. OFFICE OF THE PRESIDENT, THE ECONOMICS OF PAID AND UNPAID LEAVE 17 (2014) [hereinafter COUNCIL OF ECON. ADVISORS] (describing how paid leave and FWAs boost productivity by encouraging sick employees to stay home where they are less likely to infect coworkers and by increasing the probability that parents remain at a company instead of quitting after having children).

18. See Associated Press, *supra* note 3 (explaining that Netflix enacted their new parental policy to give employees flexibility when balancing family obligations and

urgent for women,<sup>19</sup> who continue to bear the bulk of responsibility for childbearing and childrearing in the United States.<sup>20</sup>

The value that employers and employees derive from family-friendly policies raises an important question: why are benefits disproportionately bestowed upon high-wage workers over low-wage workers? This question merits attention given the recent growth in low-wage jobs. Following the Great Recession of 2007–2009, the low-wage workforce grew faster than other sectors of the U.S. labor market.<sup>21</sup> According to the National Employment Law Project, although most employment losses in the recession occurred in mid-wage occupations, during the recovery, gains were concentrated in low-wage occupations, which increased 2.7 times as fast as high-wage occupations.<sup>22</sup> Thus, while the U.S. unemployment rate is down with numbers approximating pre-recession figures,<sup>23</sup> wages among U.S. workers have decreased or become stagnant, and a disproportionate number of new jobs have been low-wage positions.<sup>24</sup>

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work); Branson, *supra* note 1 (recognizing that “[t]he more you support your staff, the happier and healthier your business will be”). See generally U.S. DEP’T OF LABOR, THE COST OF DOING NOTHING 3–7, 30 (2015) [hereinafter THE COST OF DOING NOTHING], <https://www.dol.gov/featured/paidleave/cost-of-doing-nothing-report.pdf> (analyzing the disadvantages associated with a paid leave program against the cost of doing nothing).

19. For a discussion of family-friendly policies and gender equality, see *infra* notes 178–85 and accompanying text.

20. See ECONOMIC REPORT TO THE PRESIDENT, *supra* note 15, at 158, 162–65; KIM PARKER & WENDY WANG, PEW RESEARCH CTR., MODERN PARENTHOOD: ROLES OF MOMS AND DADS CONVERGE AS THEY BALANCE WORK AND FAMILY 3 (2013), [http://www.pewsocialtrends.org/files/2013/03/FINAL\\_modern\\_parenthood\\_03-2013.pdf](http://www.pewsocialtrends.org/files/2013/03/FINAL_modern_parenthood_03-2013.pdf) (finding that, despite an overall increase over the past fifty years, “[f]athers have by no means caught up to mothers in terms of time spent caring for children and doing household chores”).

21. NAT’L EMP’T LAW PROJECT, THE LOW-WAGE RECOVERY AND GROWING INEQUALITY 1 (2012), <http://www.nelp.org/content/uploads/2015/03/LowWageRecovery2012.pdf> (indicating that although the low-wage workforce accounted for 21% of recession job losses, they accounted for 58% of post-recession growth); Brad Plumer, *Low Wage Jobs Are Dominating the U.S. Recovery*, WASH. POST: WONKBLOG (Aug. 31, 2012), <https://www.washingtonpost.com/news/wonk/wp/2012/08/31/low-wage-jobs-are-dominating-the-u-s-recovery>.

22. NAT’L EMP’T LAW PROJECT, *supra* note 21, at 1, 4.

23. See *Labor Force Statistics from the Current Population Survey: Unemployment Rate*, U.S. DEP’T OF LAB., BUREAU OF LAB. STAT., <http://data.bls.gov/timeseries/LNS14000000> (last visited Feb. 5, 2017) (showing unemployment rate from January 2007 to January 2017).

24. See NAT’L EMP’T LAW PROJECT, *supra* note 21, at 1, 4. Recent data suggest a resurgence in middle-income jobs. For additional discussion of this resurgence and the general increase in low-wage jobs, see *infra* text accompanying notes 199–202.

Even without this type of growth, the benefits gap demands examination because data show that low-wage workers would benefit from workplace benefits as much as, and indeed in some cases more than, high-wage workers.<sup>25</sup> For example, low-wage workers are as likely as high-wage workers to have dependent care responsibilities.<sup>26</sup> They are also equally pressed for time in their personal lives, if not more so given that they often juggle multiple jobs to make ends meet.<sup>27</sup> Yet with fewer financial resources, low-wage workers are less equipped to secure childcare services that might reduce the demands of providing care.<sup>28</sup> Gender equity concerns are also present in low-wage workplaces because of the significant number of women<sup>29</sup> and single parents<sup>30</sup> employed in these settings.

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25. See KENNETH MATOS & ELLEN GALINSKY, FAMILIES & WORK INST., WORKPLACE FLEXIBILITY IN THE UNITED STATES: A STATUS REPORT 8–10 (2011), <http://familiesandwork.org/downloads/WorkplaceFlexibilityinUS.pdf> (documenting the benefits that would accrue to low-wage workers from greater workplace flexibility).

26. *Id.* at 9.

27. See *id.* at 12–14 (highlighting that many employees in a range of industries report that they do not have enough time to spend on themselves and their families). As discussed in Part II, *infra*, low-wage workers often work multiple low-wage jobs, resulting in longer periods of time on the job and commuting between jobs. This necessitates childcare for extended periods of time, often after normal business hours and on the weekends when childcare costs are at a premium.

28. ANNA DANZIGER & SHELLEY WATERS BOOTS, URBAN INST., LOWER-WAGE WORKERS AND FLEXIBLE WORK ARRANGEMENTS 5 (2008), <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1000&context=legal>.

29. See OXFAM AMERICA, WORKING POOR IN AMERICA 8–9 (2014), <https://www.oxfamamerica.org/static/media/files/Working-Poor-in-America-report-Oxfam-America.pdf> (explaining that most low-wage jobs are dominated by women and illustrating where the highest concentration of low-wage female workers are by congressional district).

30. See DANZIGER & BOOTS, *supra* note 28, at 3 (“Over 57 percent of low-income working families are headed by single parents, the vast majority of whom work.”); see also U.S. CENSUS BUREAU, AMERICA’S FAMILIES AND LIVING ARRANGEMENTS: 2015, TABLE FG6. ONE-PARENT UNMARRIED FAMILY GROUPS WITH OWN CHILDREN UNDER 18, BY MARITAL STATUS OF THE REFERENCE PERSON: 2015, [http://www.census.gov/hhes/families/files/cps2015/tabFG6-all\\_one.xls](http://www.census.gov/hhes/families/files/cps2015/tabFG6-all_one.xls) (showing that 33.3% of all one-parent unmarried family groups were below the poverty line as of 2015); GRETCHEN LIVINGSTON, PEW RESEARCH CTR., THE RISE OF SINGLE FATHERS: A NINEFOLD INCREASE SINCE 1960, at 1 (2013), <http://www.pewsocialtrends.org/files/2013/07/single-fathers-07-2013.pdf> (reporting that, in 2011, there were 2.6 million households headed by single fathers and 8.6 million headed by single mothers; 24% of those headed by single fathers lived at or below the poverty line, compared to 43% of those headed by single mothers).

This Article examines the dearth of family-friendly benefits in low-wage jobs. It seeks to understand why the benefits gap exists and what, if anything, can and should be done about it. Before proceeding, it is perhaps useful to offer a few reasons why wealthier Americans, particularly those with access to power, should care about low-wage workers (because the truth of the matter is that many such people do not). First, without adequate benefits and the kind of flexibility that enables workers to keep their jobs, many low-wage workers end up having to rely on public welfare and are unable to contribute to the country's economic growth.<sup>31</sup> Second, a lack of benefits undermines childrearing and children's welfare, which can lead to health complications, poor performance in school, and delinquency.<sup>32</sup> Third, the absence of workplace benefits contributes to gender inequality by reducing women's labor force participation.<sup>33</sup> Fourth, with a shrinking middle class,<sup>34</sup> if current disparities continue, the United States risks becoming a two-tiered society, with the rich getting richer and the poor turning into a permanent underclass.<sup>35</sup> At the end of the day, Americans must decide the type of country in which they wish to live. Do Americans want to live in a plutocracy composed of a small number of wealthy elites and a vast multitude of poor people—in effect, a second gilded age?<sup>36</sup> If the answer is yes, then is that outcome right, and is it fair? If the answer is no, then what can be done?

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31. See *infra* notes 176–77 and accompanying text.

32. See *infra* note 185 and accompanying text.

33. See *infra* notes 180–84 and accompanying text.

34. See PEW RESEARCH CTR., THE AMERICAN MIDDLE CLASS IS LOSING GROUND: NO LONGER THE MAJORITY AND FALLING BEHIND FINANCIALLY 7–8 (2015), [http://www.pewsocialtrends.org/files/2015/12/2015-12-09\\_middle-class\\_FINAL-report.pdf](http://www.pewsocialtrends.org/files/2015/12/2015-12-09_middle-class_FINAL-report.pdf) (describing how the middle class has declined for more than four decades, with the number of adults in middle-income households shrinking from 61% to 50% between 1971 and 2015).

35. Cf. Sabrina Tavernise, *Middle-Class Areas Shrink as Income Gap Grows*, *New Report Finds*, N.Y. TIMES (Nov. 15, 2011), <http://www.nytimes.com/2011/11/16/us/middle-class-areas-shrink-as-income-gap-grows-report-finds.html> (describing how the number of Americans living in middle-class neighborhoods is shrinking because of the income gap).

36. For a brief discussion of the Gilded Age in U.S. history, see Paul D. Carrington & Trina Jones, *Law Made in Skyboxes: An Evolution in American Law*, in LAW AND CLASS IN AMERICA: TRENDS SINCE THE COLD WAR 1, 3–6 (Paul D. Carrington & Trina Jones eds., 2006). For an argument that the United States has entered a second gilded age, see generally THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY pt. III–IV (Arthur Goldhammer trans., Harv. Univ. Press 2014) (showing that current levels of income inequality in the United States equal that of the Nineteenth Century and that family dynasties still control the U.S. economy).



When considering these questions, it is also important to keep the larger picture in mind. The international community recognizes and supports the need of individuals to care for themselves and their families without sacrificing the security and dignity offered by gainful employment.<sup>37</sup> Yet, when compared to other developed nations, the United States has some of the least favorable family-friendly policies.<sup>38</sup> For example, in Europe, women generally receive fourteen to twenty weeks of paid maternity leave, and both parents have access to additional paid and unpaid parental leave, which usually amount to one year of full paid leave when combined.<sup>39</sup> The United States, by contrast, is one of only two economically developed democracies that does not guarantee basic benefits like paid family leave.<sup>40</sup> Even the unpaid leave that is available under U.S. federal law<sup>41</sup> is much lower

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37. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights, arts. 23(3), 25(1) (Dec. 10, 1948), [http://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf) (stating that “[e]veryone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection,” and that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family”).

38. See REBECCA RAY ET AL., CTR. FOR ECON. & POLICY RESEARCH, PARENTAL LEAVE POLICIES IN 21 COUNTRIES: ASSESSING GENEROSITY AND GENDER EQUALITY 21 (2008, rev. 2009), [http://cepr.net/documents/publications/parental\\_2008\\_09.pdf](http://cepr.net/documents/publications/parental_2008_09.pdf).

39. Christopher J. Ruhm, *Policies to Assist Parents with Young Children*, FUTURE CHILD., Fall 2011, at 37, 41–42; see GLASSDOOR & LLEWELLYN CONSULTING, WHICH COUNTRIES IN EUROPE OFFER THE FAIREST PAID LEAVE AND UNEMPLOYMENT BENEFITS? 3, 6–9 (2016), [https://research-content.glassdoor.com/app/uploads/sites/2/2016/02/GD\\_FairestPaidLeave\\_Final.pdf](https://research-content.glassdoor.com/app/uploads/sites/2/2016/02/GD_FairestPaidLeave_Final.pdf); RAY ET AL., *supra* note 38, at 1.

40. Out of twenty-one countries studied, only Australia and the United States provide no paid maternity or paternity leave. RAY ET AL., *supra* note 38, at 14. The country with the next lowest amount of parental leave is Switzerland, which only guarantees eleven weeks of paid maternity leave. *Id.* For a more in-depth look at global maternity and paternity policies, see generally INT’L LABOUR ORG., MATERNITY AND PATERNITY AT WORK: LAW AND PRACTICE ACROSS THE WORLD (2014), [http://www.ilo.org/wcmsp5/groups/public/-dgreports/-dcomm/-publ/documents/publication/wcms\\_242615.pdf](http://www.ilo.org/wcmsp5/groups/public/-dgreports/-dcomm/-publ/documents/publication/wcms_242615.pdf); ORG. FOR ECON. CO-OPERATION & DEV., PF 2.5 TRENDS IN PARENTAL LEAVE POLICIES SINCE 1970 (updated Apr. 3, 2016), [https://www.oecd.org/els/family/PF2\\_5\\_Trends\\_in\\_leave\\_entitlements\\_around\\_childbirth.pdf](https://www.oecd.org/els/family/PF2_5_Trends_in_leave_entitlements_around_childbirth.pdf); AMY RAUB ET AL., LABOR POLICIES TO PROMOTE EQUITY AT WORK AND AT HOME: FINDINGS FROM 197 COUNTRIES AND BEIJING PLATFORM SIGNATORIES (2014), [http://worldpolicyforum.org/sites/default/files/WORLD\\_Policy\\_Brief\\_Labor\\_Policies\\_to\\_Promote\\_Equity\\_at\\_Work\\_and\\_at\\_Home\\_2015\\_0.pdf](http://worldpolicyforum.org/sites/default/files/WORLD_Policy_Brief_Labor_Policies_to_Promote_Equity_at_Work_and_at_Home_2015_0.pdf). Importantly, the dearth of paid leave in the United States may make it more difficult for U.S. companies to compete for international talent. See THE COST OF DOING NOTHING, *supra* note 18, at 6.

41. See *infra* text accompanying notes 103–10.

when compared to unpaid leave offered by other countries.<sup>42</sup> Not surprisingly, researchers have found that, among developed nations, the United States has the largest happiness gap between parents and non-parents, and this gap can be entirely explained by the lack of better family-friendly policies.<sup>43</sup> As the Secretary of Labor stated in a recent report, the United States has stood “still while family policy in the rest of the world passes us by.”<sup>44</sup> The situation is thus grim for most workers in the United States with familial obligations and, as this Article shows, even more so for low-wage workers.

The analysis proceeds as follows. Part I describes salient characteristics of low-wage workers. Part II compares benefits that are generally available to high- and low-wage workers and shows that the latter are indeed experiencing a “benefits crisis.”<sup>45</sup> Part III analyzes commonly-offered explanations for existing disparities and explains that while employers gain from family-friendly policies, they are less likely to perceive a need to adopt these policies for low-wage workers because of a surplus of low-wage workers in the labor market. This Part also explores ways in which class bias and negative views about the skill and value of low-wage labor may influence employer decision making. Part IV suggests that the likelihood of solving the benefits crisis in the near future is low given the decline of unions and limited legislative action to date. Although this Article argues for

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42. See RAY ET AL., *supra* note 38, at 11 (highlighting that the United States only offers twelve weeks of unpaid maternity leave for couples while many other countries offer substantially more, including France at 142 weeks and Spain at 140 weeks).

43. Jennifer Glass, Robin Simon & Matthew Andersson, *CCF Brief: Parenting and Happiness in 22 Countries*, COUNCIL ON CONTEMP. FAMILIES (June 15, 2016), <https://contemporaryfamilies.org/brief-parenting-happiness> (“The negative effects of parenthood on happiness were *entirely* explained by the presence or absence of social policies allowing parents to better combine paid work with family obligations.”).

44. THE COST OF DOING NOTHING, *supra* note 18, at i. Just as the United States was “shamed” into tackling pervasive racial discrimination during the period of Jim Crow, perhaps a similar “shaming” tactic might be used to argue for the extension of family-friendly policies in the United States. Cf. Derrick Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524–25 (1980) (arguing that it was the United States’ need to be morally superior in its fight against Communism, as well as the interests of African Americans, that contributed to the decision in *Brown v. Board of Education* to integrate public schools).

45. The benefits gap between high- and low-wage workers is part of a larger benefits crisis in the United States. As noted earlier, when compared to other developed nations, the United States fares poorly in providing work-life benefits across the board. See *supra* text accompanying notes 37–44. This larger benefits crisis is, however, not the focus of this Article; this work seeks only to examine the disparity in treatment between high- and low-wage employees.

greater flexibility and benefits for low-wage workers,<sup>46</sup> it does not seek to determine what the ideal level of benefits ought to be for low-wage workers or the floor beneath which benefits should not fall.<sup>47</sup> Rather, the goal here is to highlight the alarming scale of the benefits gap and to encourage employers, workers, legislators, and advocacy groups to engage in serious policy work focused on this issue.<sup>48</sup> This Article also does not examine wage differences because the movement for a higher minimum wage is already receiving national attention, while disparities in benefits and other terms and conditions of employment generally fly under the radar.<sup>49</sup>

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46. While this Article examines working parents in high- and low-wage workplaces, it bears remembering that childless workers may also benefit from inclusion in family-friendly policies as many of these workers are caregivers for siblings, parents, neighbors, and friends. For a detailed examination of the need to reconfigure family-friendly policies to include single and childfree workers, see generally Jones, *supra* note 16.

47. To be sure, an argument could be made for parity in treatment if one views benefits as categorically different from wages (e.g., as entitlements rather than as compensation).

48. Because the Article examines the benefits crisis from the perspective of both employers and employees, it should be useful to both worker rights organizations as well as management-focused entities.

49. See *About Us*, FIGHT FOR \$15, <http://fightfor15.org/about-us> (last visited Feb. 5, 2017) (describing the on-going efforts of low-wage workers to secure a \$15 minimum wage). Indeed, some evidence suggests that low-wage workers themselves are more fixated on wages as opposed to benefits and FWAs. See Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1, 10 (2005) (“Low-wage workers, for whom cash is in shorter supply, may believe that higher wages in the present are preferable to the promise of benefits at some future time, although they may later regret having made this tradeoff.”). This focus makes sense when one considers that many low-wage workers are struggling simply to survive. See *supra* notes 57–58 and accompanying text. Paying rent, buying food for one’s family, and getting adequate transportation to work are understandably more immediate and pressing concerns than securing health-care coverage, retirement benefits, and schedule adjustments for distant or unpredictable future events. Yet, a focus on wages alone, while important, is insufficient to address low-wage workers’ needs because low-wage workers, like their high-wage counterparts, experience illness and the demands of attending to dependents. Further, group benefits provided by an employer are likely greater in value than the benefits that low-wage workers might procure on their own using money from a modest wage increase. Carolyn McClanahan, *Employer Based Coverage or Obamacare Plan? Which Is Better?*, FORBES (June 23, 2013, 3:15 PM), <http://www.forbes.com/sites/carolynmcclanahan/2013/06/23/employer-based-coverage-or-obamacare-plan-which-is-better> (identifying four benefits of employer-based health-care coverage: (1) coverage is guaranteed despite pre-existing conditions, (2) federal law mandates certain coverage standards, (3) employers and employees may both avoid paying taxes on the coverage, and (4) employers subsidize part of the coverage).

## I. CHARACTERISTICS OF LOW-WAGE WORKERS

Definitions of low-wage workers vary.<sup>50</sup> Some researchers define low-wage workers as those who cannot support a family of four above the official poverty threshold after working forty hours a week for fifty-two weeks in a year.<sup>51</sup> Others define low-wage workers as those who earn less than 150% of the federal minimum wage,<sup>52</sup> or two-thirds of the median hourly wage.<sup>53</sup> Employing any of these definitions, in 2015—with a poverty threshold of \$24,036,<sup>54</sup> a federal

50. See, e.g., Bureau of Labor Statistics, U.S. Dep't of Labor, *How Should We Define "Low-Wage" Work? An Analysis Using the Current Population Survey*, MONTHLY LAB. REV., Oct. 2016, at 2, <https://www.bls.gov/opub/mlr/2016/article/pdf/how-should-we-define-low-wage-work.pdf> (discussing various techniques used to define low-wage workers); see also JAMES T. BOND & ELLEN GALINSKY, FAMILIES & WORK INST., WORKPLACE FLEXIBILITY AND LOW-WAGE EMPLOYEES 2 (2011) [hereinafter BOND & GALINSKY, WORKPLACE FLEXIBILITY], <http://familiesandwork.org/downloads/WorkFlexandLowWageEmployees.pdf>; Marlene Kim, *Women Paid Low Wages: Who They Are and Where They Work*, MONTHLY LAB. REV., Sept. 2000, at 26, 26.

51. PAMELA LOPREST ET AL., OFFICE OF THE ASSISTANT SEC'Y FOR PLANNING & EVALUATION, U.S. DEP'T OF HEALTH & HUMAN SERVS., WHO ARE LOW-WAGE WORKERS? 1 (2009), <http://aspe.hhs.gov/hsp/09/lowwageworkers/rb.pdf> (defining low-wage workers as "workers age[d] 16 to 64 whose hourly wage rate is such that even if they worked full-time, full-year their annual earnings would fall below the poverty line for a family of four"); ELLEN GALINSKY, JAMES T. BOND & EVE TAHMINCIOGLU, FAMILIES & WORK INST., NOT JUST "JOBS" . . . "GOOD JOBS": THE LOW-INCOME WORKFORCE CHALLENGE 2 n.3 (2012), [http://www.familiesandwork.org/site/research/reports/low\\_income\\_challenge.pdf](http://www.familiesandwork.org/site/research/reports/low_income_challenge.pdf) (defining low-income workers as "those who live in households below 200% of the federal poverty threshold," middle-income workers as those who live in households that are between 200–650% of the federal poverty threshold, and high-income workers as those who live in households that are at or above 650% of the federal poverty line).

52. GREGORY ACS & AUSTIN NICHOLS, URBAN INST., LOW-INCOME WORKERS AND THEIR EMPLOYERS: CHARACTERISTICS AND CHALLENGES 3 (2007), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/411532-Low-Income-Workers-and-Their-Employers.PDF>.

53. See BOND & GALINSKY, WORKPLACE FLEXIBILITY, *supra* note 50, at 2 (defining low-wage employees as "those who earn less than two-thirds the median earnings of male employees in the United States"); Gerhard Bosch, *Low-Wage Work in Five European Countries and the United States*, 148 INT'L LAB. REV. 337, 338 (2009); BOUSHEY ET AL., *supra* note 15, at 4. Some entities use neither wage nor income but classify based on whether jobs are hourly or salaried. DANZIGER & BOOTS, *supra* note 28, at 3.

54. U.S. CENSUS BUREAU, POVERTY THRESHOLDS FOR 2015 BY SIZE OF FAMILY AND NUMBER OF RELATED CHILDREN UNDER 18 YEARS, <https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-poverty-thresholds.html> (click "2015" under "Poverty thresholds by Size of Family and Number of Children") (last visited Feb. 5, 2017) (listing the poverty threshold for a four-person family with two adults and two minors).

minimum wage of \$7.25 an hour,<sup>55</sup> and a median hourly wage of \$17.40<sup>56</sup>—low-wage workers earned less than \$12 per hour.<sup>57</sup> Approximately 25–35% of the U.S. workforce fell into this category.<sup>58</sup>

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55. *Minimum Wage*, U.S. DEP'T OF LABOR, <https://www.dol.gov/general/topic/wages/minimumwage> (last visited Feb. 5, 2017).

56. *Occupational Employment Statistics: May 2015 National Occupational Employment and Wage Estimates*, U.S. DEP'T OF LAB., BUREAU OF LAB. STAT. (Mar. 30, 2016), [https://www.bls.gov/oes/current/oes\\_nat.htm#00-0000](https://www.bls.gov/oes/current/oes_nat.htm#00-0000). Experts who use the median wage often refine their analysis by delineating a particular demographic group (e.g., men) or geographical area as a basis for comparison. See, e.g., BOUSHEY ET AL., *supra* note 15, at 4 (using the median wage for men); Randy Albelda & Michael Carr, *Low-Wage and Low-Income Workers in the U.S., 1979-2009* 6 (Ctr. for Soc. Policy, Working Paper No. 2012-1, 2012), [http://scholarworks.umb.edu/cgi/viewcontent.cgi?article=1059&context=csp\\_pubs&sei-redir=1](http://scholarworks.umb.edu/cgi/viewcontent.cgi?article=1059&context=csp_pubs&sei-redir=1) (using the state median wage).

57. Regardless of methodology, most researchers “arrive at a range of \$10–11/hour in current dollars as a good cut-off point for those considered lower-wage.” DANZIGER & BOOTS, *supra* note 28, at 3 n.5. Twelve dollars an hour, to take the high end of a low-wage worker’s cut-off, translates into approximately \$24,960 a year for a worker who works eight hours a day, five days a week, for fifty-two weeks in a year. To put this figure into perspective, consider the cost of rent in Raleigh, North Carolina, where a two-bedroom apartment averages \$1247 per month, as of December 2016. *Rent Trend Data in Raleigh, North Carolina*, RENT JUNGLE, <https://www.rentjungle.com/average-rent-in-raleigh-rent-trends> (last visited Feb. 5, 2017). That translates to \$14,964 per year in rent, or 60% of the low-wage employee’s highest possible annual income. This amount is about twice the cost that experts usually recommend families spend on housing, and it leaves much less for other expenses such as food, transportation, and clothing. See Sophie Jane Evans, *More than One in Four Americans Spend at Least Half of Their Family Income on Rent*, DAILY MAIL (May 1, 2015, 9:12 AM), <http://www.dailymail.co.uk/news/article-3064136/More-one-four-Americans-spend-HALF-family-income-rent.html>. It is thus unsurprising that most experts estimate that it takes substantially more than \$10–12 an hour for families to make ends meet. See, e.g., Carey Nadeau, *Calculating the Living Wage for U.S. States, Counties, and Metro Areas*, MASS. INST. OF TECH. (Aug. 19, 2016), <http://livingwage.mit.edu/articles/19-new-data-calculating-the-living-wage-for-u-s-states-counties-and-metro-areas> (placing the living wage at \$15.12 in 2015 for a family of four with two working adults). To be sure, estimates of the living wage vary depending upon the number of working adults in a family and their geographical location. See, e.g., *Living Wage Calculator*, MASS. INST. OF TECH., <http://livingwage.mit.edu/counties/37183> (last visited Feb. 5, 2017) (suggesting that a worker would need to earn \$24.28/hour to support another non-working adult and two children in the Raleigh-Durham area of North Carolina).

58. Importantly, estimates regarding the size of the low-wage workforce vary depending upon how low-wage employment is defined. See Albelda & Carr, *supra* note 56, at 6–7 (concluding that the number of low-wage workers remained constant from the 1990s to 2009 at about 28%); BOND & GALINSKY, *WORKPLACE FLEXIBILITY*, *supra* note 50, at 2 (estimating that about one third, or 35%, of the U.S. workforce was low-wage in 2008); BOUSHEY ET AL., *supra* note 15, at 5 (finding that approximately 44 million workers, or 33% of workers, held low-wage jobs earning \$11 or less); DAVID COOPER, ECON. POLICY INST., *RAISING THE MINIMUM WAGE TO \$12 BY*

In addition to earning less by definition, low-wage worker demographics differ significantly from those of high-wage workers, as outlined in Table 1. Low-wage workers are younger on average<sup>59</sup> and are more often female.<sup>60</sup> They are mostly White, but a larger percentage of low-wage workers are of color when compared to high-wage workers.<sup>61</sup> Low-wage workers have less formal education than

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2020 WOULD LIFT WAGES FOR 35 MILLION AMERICAN WORKERS 2 (2015), <http://www.epi.org/files/2015/raising-the-minimum-wage-to-12-dollars-by-2020-would-lift-wages-for-35-million-american-workers.pdf> (finding that raising the minimum wage to \$12 by 2020 would “directly or indirectly lift wages for 35.1 million workers,” or 25% of U.S. workers); LOPREST ET AL., *supra* note 51, at 2 (finding that 31% of U.S. workers were low-wage based on 2001 data); John Schmitt, *Low-Wage Lessons*, CTR. FOR ECON. & POLICY RESEARCH (Jan. 2012), <http://cepr.net/documents/publications/low-wage-2012-01.pdf> (finding that about 24.8% of the U.S. workforce was low-wage using data from 2009); Rebecca Thiess, *The Future of Work: Trends and Challenges for Low-Wage Workers*, EPI 7 (Apr. 27, 2012), <http://www.epi.org/files/2012/bp341-future-of-work.pdf> (finding 26% of U.S. workers were low-wage using 2010 data). Calculations based on data from the Census Bureau’s 2015 Current Population Survey for persons 18–64 suggest a figure as high as 38%. See *PINC-02. Marital Status—People 18 Years Old and Over, by Total Money Income, Work Experience, Age, Race, Hispanic Origin, and Sex*, U.S. CENSUS BUREAU, <http://www.census.gov/data/tables/time-series/demo/income-poverty/cps-pinc/pinc-02.html> (click “18 to 64 Years” under “Both Sexes, Total Work Experience”) (last updated Aug. 26, 2016). When one considers that 42% of the U.S. workforce earned less than \$15 per hour in 2014, the number of low-wage or nearly low-wage workers is remarkably high. See IRENE TUNG ET AL., NAT’L EMP’T LAW PROJECT, *THE GROWING MOVEMENT FOR \$15*, 4–5 (2015), <http://www.nelp.org/content/uploads/Growing-Movement-for-15-Dollars.pdf>.

59. See GALINSKY, BOND & TAHMINCIOGLU, *supra* note 51, at 4–5 (stating that approximately 38% of low-wage workers are under age 25, compared with 8% of middle-income workers and 3% of high-income workers). Age is important because younger employees, at all levels, earn less and experience higher turnover rates as they finish their educations, explore various career options, and form romantic or other relationships that may require relocation or a job change. *Id.* at 5.

60. See BOND & GALINSKY, *WORKPLACE FLEXIBILITY*, *supra* note 50, at 3 (finding that 57% of low-wage employees are female while only 44% of higher-wage employees are female).

61. See DANZIGER & BOOTS, *supra* note 28, at 2 (finding that 38% of low-wage workers are minorities, compared with 30% of all workers). Minorities and women generally occupy lower rungs of the ladder within the low-wage workforce. Beth Shulman, *America’s Low-Wage Workers: The Demography of a Caste*, in *INEQUALITY: SOCIAL CLASS AND ITS CONSEQUENCES* 97, 98 (D. Stanley Eitzen & Janis E. Johnston eds., 2007). Furthermore, the percentage of Black and Latina women occupying the bottom rungs of the low-wage ladder is significantly higher than the percentage of White women. See MILLA FISHER, CTR. FOR AM. PROGRESS, *WOMEN OF COLOR AND THE GENDER WAGE GAP* 1, 2 (2015), <https://cdn.americanprogress.org/wp-content/uploads/2015/04/WomenOfColorWageGap-brief.pdf> (“Among working women in 2014, 62 percent of Hispanics were clustered into just two job groups—service occupations and sales and office occupations. This is compared with 57 percent of blacks, 51 percent of whites, and 44 percent of Asians in the same job categories.”).

high-wage workers but most have at least a high school diploma or its equivalent.<sup>62</sup> Although a majority of low-wage workers are married or partnered, they are less likely to be married or partnered than high-wage workers.<sup>63</sup> Low-wage workers are almost as likely to have parental responsibilities as high-wage workers.<sup>64</sup>

*Table 1: Demographics of Low-Wage Versus High-Wage Workers*<sup>65</sup>

	<i>Low-Wage Workers</i>	<i>High-Wage Workers</i>
Less than 30 Years Old	41%	15%
Female	57%	44%
Minority Group Members	42%	25%
High School Education or Less	61%	28%
Married or Living with a Partner	54%	73%
Children at Home	42%	47%

A typical image of a low-wage worker is someone who works in the fast food or restaurant industry.<sup>66</sup> Low-wage workers, however, are located throughout the U.S. economy. In addition to restaurant workers, they

62. About 35.5% of low-wage workers have a high school diploma, while 45.5% have at least some postsecondary education. ACS & NICHOLS, *supra* note 52, at 5. About 10% of low-wage workers have a four-year college degree. JOHN SCHMITT & JANELLE JONES, CTR. FOR ECON. & POLICY RESEARCH, LOW-WAGE WORKERS ARE OLDER AND BETTER EDUCATED THAN EVER 2 (2012), <https://cepr.net/documents/publications/min-wage3-2012-04.pdf>. Additionally, low-wage workers are better educated today than in the past, which mirrors the general increase in the educational attainment of the overall labor force. *See id.* at 1–2 (finding that low-wage workers who had some college education had increased from 19.5% to 33.3% between 1979 and 2011).

63. *See* BOND & GALINSKY, WORKPLACE FLEXIBILITY, *supra* note 50, at 5 (finding that 54% of low-wage workers are living with a spouse or partner while 73% of high-wage workers are living with a spouse or partner).

64. BOND & GALINSKY, WORKPLACE FLEXIBILITY, *supra* note 50, at 3.

65. Data in this Table were taken from *id.* at 4. Demographic figures will vary depending upon on how “low-wage workers” are defined and when data are collected. For example, data from DANZIGER & BOOTS, *supra* note 28, at 2, are slightly different because the authors used a different definition. *See* DANZIGER & BOOTS, *supra* note 28, at 2 (finding that only 44.8% of low-wage workers are married while 56.4% of all workers are married).

66. This image is unsurprising given that food workers constitute the second largest category of low-wage employees, behind cashiers. *Employment and Wages for the Highest and Lowest Paying Occupations*, U.S. DEP’T OF LAB., BUREAU OF LAB. STAT. (Mar. 29, 2013), [http://www.bls.gov/oes/2012/may/high\\_low\\_paying.htm](http://www.bls.gov/oes/2012/may/high_low_paying.htm) [hereinafter *Employment and Wages by Occupation*] (listing occupations with the lowest median wage in May 2012).

serve as health-care aides, childcare workers, housekeepers, porters, meat processors, agricultural workers, laundry operators, hairdressers, and manicurists, among other things.<sup>67</sup> Because the sectors of the economy in which low-wage workers toil afford few opportunities to develop skills required for upward economic mobility, low-wage workers are generally locked into low-wage jobs.<sup>68</sup>

Despite the many ways in which high- and low-wage workers differ demographically, it bears remembering that these workers are almost equally likely to have childcare responsibilities at home.<sup>69</sup> However, with fewer financial resources, low-wage workers are less able to purchase childcare services that might reduce the time demands of providing care.<sup>70</sup> In addition, they are less likely to have partners with whom to share childcare responsibilities.<sup>71</sup> Low-wage workers are therefore likely to value and to need workplace flexibility and benefits as much, and perhaps more than, their high-wage counterparts.<sup>72</sup> The time is thus ripe to consider the availability of benefits to this group.

## II. A COMPARISON OF BENEFITS IN HIGH- AND LOW-WAGE JOBS

Family-friendly benefits span a vast range but generally fall within three broad categories: (1) alternative or flexible work arrangements (“FWAs”), (2) leave time, and (3) health-care and retirement benefits. FWAs include, among other things, part-time work, flexible daily start and stop times, compressed workweeks, schedule swaps, job sharing, and telecommuting.<sup>73</sup> Leave time includes maternity and paternity leaves, sick leave to care for an employee or her family member, short-term disability leave, and authorized leave under

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67. BETH SHULMAN, *THE BETRAYAL OF WORK: HOW LOW-WAGE JOBS FAIL 30 MILLION AMERICANS AND THEIR FAMILIES* 45 (2003); OXFAM AMERICA, *supra* note 29, at 3; *Employment and Wages by Occupation*, *supra* note 66.

68. See Scott Clement & Jim Tankersley, *Training Is the Key to a Better Job. Low-Wage Workers Aren't Getting It*, WASH. POST: WONKBLOG (Nov. 27, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/11/27/training-is-the-key-to-a-better-job-low-wage-workers-arent-getting-it> (discussing the lack of training in low-wage employment).

69. DANZIGER & BOOTS, *supra* note 28, at 2.

70. *Id.* at 5.

71. *Id.* at 2, 6 (reporting that 44.8% of low-wage workers live with a spouse, compared to 56.4% of all workers).

72. *Id.* at 6–7.

73. Mary Secret, *Identifying the Family, Job, and Workplace Characteristics of Employees Who Use Work-Family Benefits*, 49 FAM. REL. 217, 217 (2000).



statutes like the Family and Medical Leave Act.<sup>74</sup> Health-care and retirement benefits include access to employer-sponsored health insurance programs and pensions (including both defined benefit and defined contribution plans).<sup>75</sup> At times, family-friendly benefits are embodied in formal policies, such as maternity and paternity leaves, and at other times they are merely informal practices, such as a supervisor's exercise of discretion in deciding whether to grant a schedule adjustment.

This Part demonstrates that, across the board, low-wage workers enjoy fewer family-friendly benefits than their high-wage counterparts.<sup>76</sup> Although this Part focuses heavily on empirical data, it is important to remember that real people lie behind the numbers. For example, consider the experience of Adam Isserlis, who works at Facebook:

After his daughter's 5 a.m. feeding during the first few months after she was born, Adam [] would lie back in bed with his newborn child resting on his chest, and the two would doze off together. Thanks to Facebook's parental-leave policy [which provides at least four months of paid parental leave], the first-time father says he enjoyed innumerable "magical" moments like these that helped him foster a bond with his new daughter. . . . "That's the way this was presented to me here at Facebook," he says. "It's like, 'Things will come and go, and we'll handle them, we'll deal with them, but you should be with your family'—that's a really important and wonderful thing."<sup>77</sup>

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74. *Id.*; Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended at 29 U.S.C. §§ 2601–2654 (2012)).

75. A defined benefit plan is an account in which the employer supplies all of the funds and promises the employee a set payout upon retirement. *What is the Difference Between a Defined Benefit Plan and a Defined Contribution Plan?*, TIME (Jan. 21, 2016, 11:19 AM), <http://time.com/money/2791222/difference-between-defined-benefit-plan-and-defined-contribution-plan>. A defined contribution plan, for instance a 401(k) or 403(b) account, requires employees to put in their own money. *Id.*

76. See generally JAMES T. BOND & ELLEN GALINSKY, WHAT WORKPLACE FLEXIBILITY IS AVAILABLE TO ENTRY-LEVEL, HOURLY EMPLOYEES? 3 (2006) [hereinafter BOND & GALINSKY, HOURLY EMPLOYEES]; BOND & GALINSKY, WORKPLACE FLEXIBILITY, *supra* note 50, at 5; DANZIGER & BOOTS, *supra* note 28, at 6; see also Wendy J. Casper et al., *Beyond Family-Friendly: The Construct and Measurement of Singles-Friendly Work Culture*, 70 J. VOCATIONAL BEHAV. 478, 496 (2007) (noting that higher-income workers have greater access to work-life benefits); *Employee Benefits Survey: Leave Benefits tbl.32*, BUREAU OF LAB. STAT., U.S. DEP'T OF LAB., <http://www.bls.gov/ncs/ebs/benefits/2013/ownership/private/table21a.htm> (last visited Feb. 5, 2017) (showing differential access to employment benefits by occupation).

77. Gillett, *supra* note 6.

Not only does Facebook grant its employees paid parental leave, the company's website states that it also offers

- *Medical, dental and vision insurance* to keep you and your family healthy;
- *Medical second opinion service* to make sure you get the best care;
- *Competitive retirement plans* to help you plan for the future;
- *Life insurance and survivor support* to give you peace of mind;
- *Generous vacation days* so you can take time off when you need it; . . .
- *Support for family planning*: adoption and surrogacy assistance, and *baby cash* to help with newborn expenses;
- *Wellness allowance* to support all your healthy activities;
- [An] Employee assistance program;
- *Transportation support* for a stress-free commute; [and]
- *Meals and snacks* when you need them.<sup>78</sup>

Moreover, the website states that the above is only “a snapshot of *some* of the benefits” that Facebook offers.<sup>79</sup>

Compare Adam's experience to that of Latavia Johnson, an employee at Wal-Mart, the nation's largest private employer.<sup>80</sup> Ms. Johnson reported,

I worked in the Bakery Department at Wal-Mart in Granite City, Illinois, as a cake decorator. When I found out I was pregnant, my doctor told me I had a high-risk pregnancy and that I could no longer lift over 25 pounds on the job. I brought my doctor's recommendation to my manager, and she told me she needed to see a doctor's note. I brought her a note that same day, but instead of giving me lighter duty work, she told me that I didn't need to come back to work until my restrictions were lifted.

I was making only \$8.85 an hour and living at home with my mother. When I started, I was happy the store would give me 40 hours each week. But soon they started cutting back my hours until I was only getting around 25 hours per week. With an infant at home and another baby on the way, I was already struggling to help my mom pay rent, keep up with car payments and put food on the table. Needless to say, when Wal-Mart told me to stop coming

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78. See *Benefits, North America*, FACEBOOK, <https://www.facebook.com/careers/benefits> (last visited Feb. 5, 2017) (emphasis added).

79. *Id.* (emphasis added).

80. Latavia Johnson, *Wal-Mart Put Me Through Hell: Inside the Retailer's Pregnancy Discrimination Horror*, SALON (Apr. 6, 2015, 5:58 AM), [http://www.salon.com/2015/04/06/walmart\\_put\\_me\\_through\\_hell\\_inside\\_the\\_retailers\\_pregnancy\\_discrimination\\_horror/](http://www.salon.com/2015/04/06/walmart_put_me_through_hell_inside_the_retailers_pregnancy_discrimination_horror/); Alexander E.M. Hess, *The 10 Largest Employers in America*, USA TODAY (Aug. 22, 2013, 7:48 AM), <http://www.usatoday.com/story/money/business/2013/08/22/ten-largest-employers/2680249>.

to work because of my pregnancy complications, I didn't have any money saved.

For the next three months, I was out of work. I kept calling to ask my managers if they could put me somewhere with lighter duties and give me some hours so I could support my son. They refused to give me any work.<sup>81</sup>

On its website, Wal-Mart lists the following among its benefits:

- Consumer-directed health plans, including Health Reimbursement Accounts (HRA) . . . and a high deductible plan with a Health Savings Account (HSA);<sup>82</sup>
- HMO plans (available in certain areas);
- Vision plan;
- Dental plan;
- Resources For Living—a free confidential counseling and health information service;
- Company-paid life insurance;
- Accidental death & dismemberment insurance (AD&D);
- Critical illness insurance;
- Short- and long-term disability insurance;
- Business Travel Accident Insurance;
- Illness Protection (Sick Time).<sup>83</sup>

In short, Wal-Mart says it offers its employees life and health insurance, health counseling, and sick leave. But anecdotally, its low-wage employees do not enjoy robust family benefits.<sup>84</sup>

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81. Johnson, *supra* note 80. Ms. Johnson eventually connected with a group of Wal-Mart workers who were fighting pregnancy discrimination and was able to resume work. *Id.* She reports, however, that after returning to work, her hours were restricted even more, and that in her last trimester, “managers were still pushing me to lift heavy objects, even though they knew I couldn’t lift over 25 pounds.” *Id.* Wal-Mart employees experiencing complications from pregnancy may be covered under the company’s disability policy, but the scope of coverage remains unclear. See Bryce Covert, *Pregnancy Workers at Walmart Fear the Company’s New Policy Won’t Go Far Enough to Protect Them*, THINKPROGRESS (Apr. 8, 2014), <http://thinkprogress.org/economy/2014/04/08/3424336/walmart-pregnant-disability-policy> (discussing Wal-Mart’s response to allegations of pregnancy discrimination).

82. *Benefits, Health & Well-Being Benefits*, WAL-MART, <http://careers.walmart.com/about-us/working-here/benefits> (last visited Feb. 5, 2017). The website lists the following as highlights of these plans: “100 percent coverage for eligible in-network preventive care; \$4 co-pay on eligible generic drugs at Walmart or Sam’s Club pharmacies; [and] [f]ree access to nurse care managers and health care advisors.” *Id.*

83. *Id.*

84. On March 5, 2016, Wal-Mart began offering its employees paid time off (PTO), which includes vacation, sick, holiday, and personal leave. News Release, *More Than One Million Walmart Associates to Receive Pay Increase in 2016* (Jan. 20,

To be sure, the above illustrations are extremes. Facebook is among the corporations offering more generous benefits, while Wal-Mart lies at the other end of the spectrum. This comparison nonetheless gives the reader a sense of the differing realities that high- and low-wage workers face. It is a glimpse into the lives of the people behind the following data.

*A. FWAs and Part-Time Work*

High-wage workers are more likely than low-wage workers to be offered flextime,<sup>85</sup> which includes a broad range of practices designed to afford employees flexibility in determining their work schedules.<sup>86</sup> Even when they have access to flextime, low-wage workers are more likely than high-wage workers to report that using it will negatively impact their job advancement.<sup>87</sup>

While low-wage employees are less likely than high-wage employees to be afforded flextime, they are more likely to be over-represented in part-time positions.<sup>88</sup> Generally speaking, part-time work can be something of a “mixed blessing.”<sup>89</sup> On the one hand, it allows employees to pursue other life goals, including attending school, caring for family members, traveling, engaging in personal hobbies, or phasing into retirement.<sup>90</sup> On the other hand, part-time employment tends to be associated with lower-paying occupations and industries and often results in fewer workplace benefits, limited

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2016), <http://news.walmart.com/news-archive/2016/01/20/more-than-one-million-walmart-associates-receive-pay-increase-in-2016>. PTO is based on hours worked and years with the company. *Id.*

85. See BOND & GALINSKY, *HOURLY EMPLOYEES*, *supra* note 76, at 4; see also OFFICE OF DISABILITY EMP’T POLICY, WOMEN’S BUREAU, U.S. DEP’T OF LABOR, *ADVANCING WORKPLACE FLEXIBILITY POLICY AND PRACTICES 1* (2011), <http://www.dol.gov/odep/pdf/WBForum.pdf> [hereinafter *ADVANCING WORKPLACE FLEXIBILITY*] (pointing out that “large segments of the U.S. labor force—particularly low-wage workers in various occupations and industries—continue to have limited access to flexible workplace options”).

86. As noted earlier, FWAs include, among other things, flexible arrival and departure times, flexible scheduling of breaks, the use of lunch in exchange for early departures, banking time to secure future time off, and voluntary scheduling swaps. See *supra* text accompanying note 73.

87. See Amy Richman, Arlene Johnson, & Lisa Buxbaum, *Workplace Flexibility for Lower-Wage Workers*, CORP. VOICES FOR WORKING FAMILIES, Oct. 2006, at 16.

88. BOND & GALINSKY, *WORKPLACE FLEXIBILITY*, *supra* note 50, at 3 (noting that 32% of low-wage workers work part-time jobs, compared to 9% of high-wage workers).

89. BOND & GALINSKY, *HOURLY EMPLOYEES*, *supra* note 76, at 5–6.

90. *Id.*

statutory protections,<sup>91</sup> and less financial stability.<sup>92</sup> Thus, unlike in high-wage employment, where part-time work may sometimes be desired and affordable,<sup>93</sup> in low-wage work, full-time employment is often preferred.<sup>94</sup> Indeed, the number of workers who worked part-time because they could not find full-time employment almost doubled over the past decade, and low-wage workers disproportionately fall within this group.<sup>95</sup> In sum, because of the grim economic reality of part-time work in low-wage settings, low-wage workers are less likely than their high-wage counterparts to embrace part-time employment.

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91. For example, to be covered under the Family and Medical Leave Act, an employee must have worked at least 1250 hours for her employer in the previous twelve months. See *infra* notes 103–10 and accompanying text for a discussion of the FMLA’s eligibility requirements. Under the Affordable Care Act, employers are only required to provide health insurance to their full-time employees. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified in scattered sections of 42 U.S.C.); U.S. TREASURY DEP’T, FACT SHEET: FINAL REGULATIONS IMPLEMENTING EMPLOYER SHARED RESPONSIBILITY UNDER THE AFFORDABLE CARE ACT (ACA) FOR 2015, <https://www.treasury.gov/press-center/press-releases/Documents/Fact%20Sheet%20021014.pdf> (last visited Feb. 5, 2017).

92. See SUSAN BISOM-RAPP & MALCOLM SARGEANT, LIFETIME DISADVANTAGE, DISCRIMINATION AND THE GENDERED WORKFORCE 7 (2016) (noting that “[b]y one estimate, the wage penalty for working part-time increased in the United States ‘from 30 to 46 percent’ between 1979 and 2012”). Importantly, some employers have hired part-time workers to avoid paying benefits. See, e.g., Laura Heller, *Obamacare Is Turning Walmart Workers into Temps*, FORBES (June 14, 2013, 6:47 PM), <http://www.forbes.com/sites/lauraheller/2013/06/14/obamacare-is-turning-walmart-workers-into-temps> (describing Wal-Mart’s efforts to avoid providing health-care coverage to its workers by moving more of its workforce to part-time status).

93. See Fahri Karakas & Mary Dean Lee, *A Qualitative Investigation into the Meaning of Family Well-Being from the Perspective of Part-Time Professionals*, 23 EQUAL OPPORTUNITIES INT’L 57, 64–67 (2004) (finding that part-time work allows professionals more time to interact with neighbors and participate in community affairs).

94. See DANZIGER & BOOTS, *supra* note 28, at 4 (commenting that salaried workers want FWAs to reduce hours, whereas hourly workers prefer to work more hours to increase their incomes). More than a third of low-wage and hourly part-time employees would prefer to work full-time. *Id.* (citing JENNIFER SWANBERG, WORKPLACE STRUCTURE AND ITS IMPACT ON HOURLY WORKERS AND THEIR FAMILIES 16 (2008)).

95. GALINSKY, BOND & TAHMINCIOGLU, *supra* note 51, at 1; see also SUSAN J. LAMBERT & JULIA R. HENLY, MOBILITY AGENDA, SCHEDULING IN HOURLY JOBS: PROMISING PRACTICES FOR THE TWENTY-FIRST CENTURY ECONOMY 5 (2009), [https://ssascholars.uchicago.edu/sites/default/files/work-scheduling-study/files/lambert\\_and\\_henly\\_scheduling\\_policy\\_brief\\_0.pdf](https://ssascholars.uchicago.edu/sites/default/files/work-scheduling-study/files/lambert_and_henly_scheduling_policy_brief_0.pdf) (noting that even before the Great Recession, “a greater proportion of workers reported they would prefer to work more (27 percent) rather than fewer (7 percent) hours,” particularly among part-time employees who had irregular work schedules).

*B. Leaves*

In addition to fewer FWAs, low-wage workers are less likely than high-wage workers to have access to paid family leave, paid sick leave, or short-term disability leave.<sup>96</sup> Family leave covers maternity and paternity leave for parents following the birth, adoption, or foster placement of a child as well as time off for an employee to care for herself, her child, or an adult family member with a serious health condition.<sup>97</sup> Sick leave, by contrast, grants workers time off for their own more temporary and less serious illnesses like migraines, stomach aches, and short-term absences due to viruses. Short-term disability leave generally covers lost wages for temporary absences, usually less than six months, resulting from an employee's disabling, non-work-related injury or illness.<sup>98</sup> When looking at all forms of leave, data show that "full-time[] workers in the top income quartile are 1.7 times as likely to have access to paid leave as workers in the bottom quartile (83 percent versus 50 percent)."<sup>99</sup> If one disaggregates the various forms of leave, data show that 22% of high-wage workers have access to paid family leave,<sup>100</sup> while 5% of low-wage workers have such access; 62% of high-wage workers have access to paid short-term disability leave, while 16% of low-wage workers have

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96. DANZIGER & BOOTS, *supra* note 28, at 5.

97. See, e.g., U.S. DEP'T OF LABOR, THE EMPLOYEE'S GUIDE TO THE FAMILY AND MEDICAL LEAVE ACT 4–5 (2015). A serious health condition would include an illness, injury, impairment, or physical or mental condition requiring inpatient care in a hospital or other residential medical care facility, or continuing medical treatment or supervision by a health-care provider. *Id.* at 4; see 29 U.S.C. § 2611(11) (2012).

98. Kristen Monaco, *Disability Insurance Plans: Trends in Employee Access and Employer Costs*, BUREAU OF LAB. STAT.: BEYOND THE NUMBERS, Feb. 2015, at 1, <https://www.bls.gov/opub/btn/volume-4/pdf/disability-insurance-plans.pdf>.

99. COUNCIL OF ECON. ADVISORS, *supra* note 17, at 12; see also Brooks Pierce, *Compensation Inequality*, 116 Q.J. ECON. 1493 (2001) (finding that total compensation inequality between high- and low-wage workers was about 10% higher than wage inequality alone and that unequal access to leave accounted for about one third of the additional gap); Danielle Paquette, *The Stark Disparities of Paid Leave: The Rich Get to Heal. The Poor Get Fired.*, WASH. POST (Jan. 16, 2015), <http://www.washingtonpost.com/blogs/wonkblog/wp/2015/01/16/the-stark-disparities-of-paid-leave-the-rich-get-to-heal-the-poor-get-fired> (referencing benefit disparities between low- and high-wage earners in the context of proposals for more paid leave).

100. THE COST OF DOING NOTHING, *supra* note 18, at 8 (using 2014 data for private sector employees). Overall, only 12% of all private sector workers had access to paid family leave in 2014. *Id.*

such access;<sup>101</sup> and high-wage workers are almost twice as likely as low-wage workers to receive paid sick leave.<sup>102</sup>

To be sure, many low-wage workers are eligible to take leave to care for themselves, or for their parent, child, or spouse, under the Family and Medical Leave Act (FMLA).<sup>103</sup> The FMLA, however, only applies to employers with fifty or more employees, and these employees must have worked for their employer at least 1250 hours in the twelve-month period prior to requesting leave.<sup>104</sup> Because many low-wage workers are employed in small firms<sup>105</sup> and are engaged in part-time work,<sup>106</sup> their employers may not be covered by the FMLA, or the workers themselves may be unable to meet the eligibility requirements.<sup>107</sup> By one estimate, 25–28% of workers in low-income

101. *Id.* Overall, only 40% of all private sector workers had access to paid short-term disability leave in 2014.

102. See BOND & GALINSKY, *HOURLY EMPLOYEES*, *supra* note 76, at 3. Researchers found that only 39% of low-wage workers had paid sick leave. *Id.* By contrast, 79% of high-wage workers had at least some paid time off for personal illness. *Id.* In addition, only one-quarter (24%) of low-wage employed parents were allowed time off to care for a sick child without losing pay. *Id.* By contrast, more than half (54%) of high-wage employed parents were allowed a few days off to care for sick children without losing pay or having to use vacations days. *Id.*

103. 29 U.S.C. § 2612(a)(1)(C), (D) (2012). Roughly 60% of the U.S. labor force, or approximately 93 million workers, met the FMLA's eligibility requirements in 2012. See JACOB ALEX KLERMAN ET AL., ABT ASSOCIATES, INC., *FAMILY AND MEDICAL LEAVE IN 2012: TECHNICAL REPORT i–ii* (2012), <http://www.dol.gov/asp/evaluation/fmla/FMLA-2012-Technical-Report.pdf> [hereinafter *FMLA TECHNICAL REPORT*]; *Labor Force Statistics from the Current Population Survey: Civilian Labor Force Level*, U.S. DEP'T OF LAB., BUREAU OF LAB. STAT., <https://data.bls.gov/timeseries/LNS11000000> (last visited Feb. 5, 2017) (compiling statistics on the size of the U.S. workforce).

104. § 2611(2)(A)(ii), (4)(A).

105. Estimates vary regarding the actual number of low-wage workers in small firms, depending upon year and methodology employed. Recent data suggest that about 34% of low-wage workers work for companies with fewer than 100 employees. NAT'L EMP'T LAW PROJECT, *DATA BRIEF: BIG BUSINESS, CORPORATE PROFITS, AND THE MINIMUM WAGE* (2012), [http://nelp.3cdn.net/e555b2e361f8f734f4\\_sim6btdzo.pdf](http://nelp.3cdn.net/e555b2e361f8f734f4_sim6btdzo.pdf). But see ACS & NICHOLS, *supra* note 52, at 7 (using data from 2004 and finding that approximately 63% of low-wage workers were employed in firms with fewer than 100 workers).

106. Low-income workers who work several part-time jobs for different employers would not meet the hour's requirement by combining jobs. DIVERSITY DATA KIDS, *INEQUITIES IN ELIGIBILITY FOR FMLA LEAVE*, <http://www.diversitydatakids.org/files/Policy/FMLA/Capacity/Inequities%20in%20FMLA%20eligibility.pdf> (last visited Feb. 5, 2017).

107. *Families and Employers in a Changing Economy*, U.S. DEP'T OF LAB., WAGE & HOUR DIV., <https://www.dol.gov/whd/fmla/1995report/summary.htm> (last visited Jan. 25, 2017). The Department of Labor found that about two thirds (66.1%) of U.S. workers, including in both the private and public sectors, are employed by businesses or entities covered by the FMLA. *Id.* More than half (54.9%) of U.S.

families are either not covered by, or are ineligible for, FMLA benefits.<sup>108</sup> Notably, the floor provided by the FMLA is for *unpaid* leave,<sup>109</sup> and low-wage workers generally cannot afford the loss of income required to use it.<sup>110</sup>

### C. Health-Care and Retirement Benefits

In addition to FWAs and leaves, low-wage workers are less well off than high-wage workers with regard to health-care and retirement benefits. For example, low-wage workers are more likely to work for companies that offer no health-care coverage.<sup>111</sup> In 2010, only 18% of workers earning less than \$15 an hour in small firms were covered by their employers' health plans, while more than half (53%) of high-

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workers (and 46.5% of private sector workers) also meet the FMLA's eligibility requirements regarding length of service and hours.

108. Katherin Ross Phillips, *Working for All Families? Family Leave Policies in the United States*, in *THE ECONOMICS OF WORK AND FAMILY* 159–81 (Jean Kimmel & Emily Hoffman eds., 2002).

109. § 2612(c). Although the statute only mandates unpaid leave, employers are free to offer paid leave.

110. COUNCIL OF ECON. ADVISORS, *supra* note 17, at 3; THE COST OF DOING NOTHING, *supra* note 18, at 12–13; *see also* Wen-Jui Han & Jane Waldfogel, *Parental Leave: The Impact of Recent Legislation on Parents' Leave Taking*, 40 *DEMOGRAPHY* 191, 198 (2003) (maintaining that financial pressures force parents to work as much as possible to provide for their children and create a disincentive to take unpaid leave, even if it means sacrificing time with their children). In response to these limitations, a few states in recent years have enacted paid leave policies. *See, e.g.*, California Paid Family Leave Law, CAL. UNEMP. INS. CODE § 3300(f) (West 2013) ("The majority of workers in this state are unable to take family care leave because they are unable to afford leave without pay."). *See infra* Section IV.B for a discussion of paid leave laws.

111. RUTH ROBERTSON ET AL., COMMONWEALTH FUND, *REALIZING HEALTH REFORM'S POTENTIAL: JOBS WITHOUT BENEFITS: THE HEALTH INSURANCE CRISIS FACED BY SMALL BUSINESSES AND THEIR WORKERS* 4 (2012), [http://www.commonwealthfund.org/~media/files/publications/issue-brief/2012/oct/1640\\_robertson\\_jobs\\_without\\_benefits\\_small\\_businesses.pdf](http://www.commonwealthfund.org/~media/files/publications/issue-brief/2012/oct/1640_robertson_jobs_without_benefits_small_businesses.pdf) ("Low-wage workers in small and large firms were the least likely of all employees to have health benefits through their jobs."); *see also* KAISER FAMILY FOUND., *SURVEY BRIEF: LOW-WAGE WORKERS AND HEALTH CARE* 2 (2008), <http://kaiserfamilyfoundation.files.wordpress.com/2013/01/7804.pdf> (finding that 72% of low-wage workers in low-income households find it difficult to afford health care and health insurance); SHERRY GLIED & BISUNDEV MAHATO, COMMONWEALTH FUND, *THE WIDENING HEALTH CARE GAP BETWEEN HIGH- AND LOW-WAGE WORKERS* 2 (2008), [http://www.commonwealthfund.org/~media/files/publications/issue-brief/2008/may/the-widening-health-care-gap-between-high-and-low-wage-workers/glied\\_wideninggapbetweenhighlowwageworkers\\_1129\\_ib-pdf.pdf](http://www.commonwealthfund.org/~media/files/publications/issue-brief/2008/may/the-widening-health-care-gap-between-high-and-low-wage-workers/glied_wideninggapbetweenhighlowwageworkers_1129_ib-pdf.pdf) (noting that low-wage workers are less likely than high-wage workers to work for companies offering health coverage).



wage workers in small firms had such coverage.<sup>112</sup> In larger firms, only 47% of workers earning less than \$15 an hour had health benefits through their jobs, while 81% of high-wage workers received these benefits.<sup>113</sup> Even when low-income workers have employer-sponsored health insurance, they often have difficulty paying their share of the costs.<sup>114</sup> Early evidence suggests that the Affordable Care Act has not greatly changed this state of affairs.<sup>115</sup>

Similar findings have been reported with regard to retirement benefits. Among all civilian workers, 42% in the lowest 25% wage category have access to retirement benefits, while 89% in the highest wage category have such access.<sup>116</sup> Twenty-two percent of workers in the lowest 25% actually participate in their employer-sponsored plans, while 79% of employees in the highest 25% do so.<sup>117</sup>

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112. ROBERTSON ET AL., *supra* note 111, at 4.

113. *Id.*

114. SARA R. COLLINS ET AL., COMMONWEALTH FUND, ON THE EDGE: LOW WAGE WORKERS AND THEIR HEALTH INSURANCE COVERAGE 4 (2003), [http://www.commonwealthfund.org/~media/files/publications/issue-brief/2003/mar/on-the-edge-low-wage-workers-and-their-health-insurance-coverage/collins\\_on\\_theedge\\_ib\\_626-pdf.pdf](http://www.commonwealthfund.org/~media/files/publications/issue-brief/2003/mar/on-the-edge-low-wage-workers-and-their-health-insurance-coverage/collins_on_theedge_ib_626-pdf.pdf).

115. The Affordable Care Act, also known as Obamacare, requires employers with more than fifty workers to provide their full-time employees (those working thirty or more hours per week) with employer-sponsored health-care plans. If an employer offers health-insurance plans, workers cannot buy outside health insurance, even if their income level would have rendered them eligible in the absence of their employer's plan. Thus, some low-wage workers (those who are not offered coverage through their employers) have secured previously unaffordable insurance through health-care exchanges by using subsidies and expanded Medicaid benefits. However, data show that low-wage workers who receive coverage through their employers have been reluctant to use employer-sponsored plans. Stacy Cowley, *Many Low-Income Workers Say "No" to Health Insurance*, N.Y. TIMES (Oct. 19, 2015), <http://www.nytimes.com/2015/10/20/business/many-low-income-workers-say-no-to-health-insurance.html>.

116. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, TABLE 2. RETIREMENT BENEFITS: ACCESS, PARTICIPATION, AND TAKE-UP RATES, CIVILIAN WORKERS, NATIONAL COMPENSATION SURVEY (2015), <http://www.bls.gov/ncs/ebs/benefits/2015/ownership/civilian/table02a.pdf>. For defined benefit programs, the numbers are 8% for those in the lowest 25% and 50% for those in the highest 25% of wage earners. *Id.* For defined contribution plans, the numbers are 37% for those in the lowest 25% and 71% for those in the highest 25%. *Id.*

117. *Id.* "Take rate" (i.e., the percentage of employees who use benefits when they have access to them) differences suggest that not only must policy makers be attentive to who gets benefits; they must also consider the accessibility of benefits, in terms of costs, when they are provided. VICKIE CHOITZ, AARP PUB. POL'Y INST., MORE WORK AND AN ELUSIVE RETIREMENT (2015), <http://www.aarp.org/content/dam/aarp/ppi/2015/choitz-more-work-and-an-elusive-retirement-essay.pdf> (noting that defined benefit pensions are more expensive for employers, but the less expensive defined

*D. Other Considerations*

The foregoing analysis highlights ways in which low-wage workers are worse off than their high-wage counterparts in terms of FWAs, leaves, and other benefits. This comparative analysis, however, does not fully capture the precarious nature of many low-wage jobs. Low-wage work can be physically demanding, emotionally degrading, and dangerous.<sup>118</sup> Many low-wage laborers toil in harsh working environments, with high injury rates and unsafe conditions.<sup>119</sup> They have unpredictable schedules, which are subject to change with little or no notice.<sup>120</sup> Thus, depending upon employer needs, low-wage workers may be subject to mandatory and unscheduled overtime;<sup>121</sup> conversely, their hours may be cut, and they may be placed on temporary or informal layoff.<sup>122</sup> They frequently have no control over the timing of their breaks.<sup>123</sup> And, they are more likely to work nonstandard hours, including overnight shifts and weekends.<sup>124</sup> Low-wage work is rendered more difficult by the fact that many low-wage workers must juggle multiple jobs to make ends meet.

These factors have consequences. Researchers have shown that unpredictable schedules lead to “financial instability,” which can make securing and paying for adequate childcare more challenging.<sup>125</sup> Financial instability can also lead to “residential instability, changes in . . . schools for children, and indebtedness to kin and friends to whom workers turn for support.”<sup>126</sup> Factoring in that workers and children in low-income families have greater health challenges,<sup>127</sup> and that low-wage workers are more likely to be

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contribution plans reduce retirement security for low-wage workers who “often cannot afford to contribute to retirement accounts”).

118. See Kiran Dhillon, *The 10 Most Dangerous Jobs and How Much They Pay*, TIME (Oct. 23, 2014), <http://time.com/money/3430567/most-dangerous-jobs-what-pay>.

119. *Id.*

120. DANZIGER & BOOTS, *supra* note 28, at 4.

121. See *id.* at 4 (acknowledging that “[a]lthough lower-wage workers often depend on the extra income that overtime shifts can provide, unexpected shifts may be unmanageable if they conflict with family responsibilities”).

122. *Id.* at 4–5.

123. *Id.* at 5.

124. MARIA E. ENCHAUTGUI, URBAN INST., NONSTANDARD WORK SCHEDULES AND THE WELL-BEING OF LOW-INCOME FAMILIES 1–2 (2013), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412877-Nonstandard-Work-Schedules-and-the-Well-being-of-Low-Income-Families.pdf>.

125. DANZIGER & BOOTS, *supra* note 28, at 4.

126. *Id.*

127. *Id.* GALINSKY, BOND & TAHMINCIOGLU, *supra* note 51, at 4–5 (reporting that low-income employees are “less satisfied with their jobs, less likely to want to remain

providing care to aging parents,<sup>128</sup> the need for greater benefits and FWAs for these workers becomes more urgent.<sup>129</sup>

### III. EXPLANATIONS FOR THE ABSENCE OF FAMILY-FRIENDLY BENEFITS IN LOW-WAGE JOBS

As Part II demonstrates, low- and high-wage workers experience significant disparities in terms of access to flextime, leaves, health-care, and retirement benefits. This Part evaluates commonly-offered explanations for these differences. Section A examines arguments related to the cost of extending benefits to a larger array of workers. Section B analyzes whether the law of supply and demand disadvantages low-wage workers. Section C considers whether low-wage workers are somehow undeserving of greater benefits due to their skill levels and the value of their work. This Section also explores how race, gender, and class affect the allocation of workplace benefits. Finally, Section D looks at structural impediments that may distinguish some low- and high-wage workplaces.

The analysis in these Sections supports three conclusions: (1) while family-friendly benefits produce positive returns for employees, employers, and the general society, employers will be loath to extend these benefits to low-wage workers because of a surplus of low-wage workers in the labor market; (2) negative perceptions of the skill of low-wage workers and the value of low-wage work are likely to have an adverse effect on employer decision making; and (3) these perceptions, as well as class-based stereotypes and biases, will likely affect the willingness of employers and legislators to act. All of the foregoing determinations underscore the gravity of the benefits crisis.

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with their employers and in poorer physical and mental health than their counterparts in higher income groups”).

128. *Id.*

129. Low-wage workers are entitled, by law, to certain workplace protections, including a minimum wage, pay for overtime hours, meal breaks, workers' compensation when injured, and the right to advocate for better working conditions. Yet, these rights are frequently violated. See ANNETTE BERNHARDT ET AL., *BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES* (2009), [http://nelp.3cdn.net/e470538bfa5a7e7a46\\_2um6br7o3.pdf](http://nelp.3cdn.net/e470538bfa5a7e7a46_2um6br7o3.pdf) (exploring data from a study of low-wage industries in Chicago, Los Angeles, and New York City that found rights violations). Thus, protecting existing rights would go far in improving the employment conditions for these workers.

### A. *Costs*

Critics of extending family-friendly benefits to low-wage workers often assert that such action will be too costly and will impose unfair burdens on employers.<sup>130</sup> For example, some detractors claim that managing more FWAs and leaves will be administratively difficult, time consuming, and expensive as temporary replacements for absent employees will need to be hired and trained,<sup>131</sup> or schedules will need to be rearranged and projects reassigned to avoid hiring new workers.<sup>132</sup> Critics raise similar cost objections to the extension of other benefits such as health insurance coverage and retirement benefits. They argue that checking eligibility requirements will involve tedious administrative paperwork<sup>133</sup> and will require employers to incur more out-of-pocket expenses due to a larger number of covered employees.<sup>134</sup> When one considers that low-wage workers are approximately 25–35% of the labor force,<sup>135</sup> some argue that these costs will be exorbitant.<sup>136</sup>

In addition to the above, some have argued that the provision of additional benefits, particularly paid family leave, will lead employers

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130. See THE COST OF DOING NOTHING, *supra* note 18, at 14.

131. See ADVANCING WORKPLACE FLEXIBILITY, *supra* note 85, at 2. Filling a vacant position requires that an employer advertise for the position, interview applicants, and train new hires.

132. See *id.* at 2 (discussing many of these arguments); Jennifer E. Swanberg et al., *Workplace Flexibility for Hourly Lower-Wage Employees: A Strategic Business Practice Within One National Retail Firm*, 11 PSYCHOL. MANAGER J. 5, 21 (2008) (recording management concerns about the “work and time spent by managers and designated schedulers in responding to employee schedule requests”). Even if an employer can fill a vacant position with an existing employee, the employer may still face significant hurdles as the replacement employee would likely need to be trained, if she is not already familiar with the position, or offered additional compensation for the added work through a salary increase or overtime wages, which are generally higher than normal wages. Moreover, the employer might have to repeat the same process to fill the replacement employee’s own regular position.

133. To be sure, the bulk of this administrative work would occur at the time eligibility is established.

134. See generally ROBERTSON ET AL., *supra* note 111, at 1 (highlighting that among small businesses, where the erosion of employee health insurance is greatest, the employers are weary of “higher per-employee administrative costs, including broker commissions”).

135. See *supra* notes 50–58 and accompanying text (discussing the various definitions of low-wage workers).

136. Cowley, *supra* note 115 (illustrating the uneasiness of employers when faced with having to provide health insurance to employees).

to discriminate against low-wage workers and women.<sup>137</sup> For example, detractors assert that an expansion of benefits will make jobs more expensive and employers less willing and able to hire low-wage workers<sup>138</sup> and women.<sup>139</sup>

These arguments are not new. For decades, employers have resisted proposals for additional workplace flexibility and benefits. For example, when maternity leave policies were proposed in the 1970s<sup>140</sup> and when the FMLA was proposed two decades later, employers asserted that these policies would be cost prohibitive, administratively taxing, and disruptive,<sup>141</sup> and that added costs would negatively affect hiring, particularly the hiring of women.<sup>142</sup>

While these arguments cannot be dismissed out of hand, costs must always be balanced against benefits. Too frequently, proponents of the cost argument overlook,<sup>143</sup> or too readily dismiss, the numerous

137. See Mary Ann Case, Commentary, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI.-KENT L. REV. 1753, 1760–61 (2001) (discussing the above concern and noting that, “In [family leave,] as in so many areas of Title VII antidiscrimination law, employers may have learned what not to say; unfortunately, this does not guarantee that they have learned what not to do”); see also Naomi Cahn & June Carbone, *Lifting the Floor: Sex, Class, and Education*, 39 UNIV. BALT. L.F. 57, 73 (2008) (arguing that there must be meaningful access to parental leave for both women and men). The concern about a reduction in available jobs would seem to apply to both high- and low-wage positions. However, employers may be more willing to assume additional costs when dealing with scarce labor. For more analysis of how supply and demand forces may influence employer decision making, see *infra* Section III.B.

138. Cahn & Carbone, *supra* note 137, at 73 (noting “[m]andating parental leave makes individual jobs more expensive for employers, making them less likely to hire poorly educated or unskilled workers”).

139. See, e.g., Veronique de Rugy, *Women vs. the State*, REASON MAG. (Mar. 8, 2012), <https://reason.com/archives/2012/03/08/women-vs-the-state>. De Rugy notes:

Even regulations meant to protect women produce bad outcomes. Government mandates that force employers to approve lengthy maternity leaves make hiring women of childbearing age less appealing. As a result, women are more likely to be unemployed or to see their compensation reduced, whether they want to have children or not.

*Id.*

140. In the early 1970s, few employers offered maternity leave and many required pregnant women to resign. Erin Kelly & Frank Dobbin, *Civil Rights Law at Work: Sex Discrimination and the Rise of Maternity Leave Policies*, 105 AM. J. SOC. 455, 456 (1999).

141. Cynthia L. Remmers, *Pregnancy Discrimination and Parental Leave*, 11 INDUS. REL. L.J. 377, 407 (1989).

142. *Id.* at 400.

143. ECON. REPORT TO THE PRESIDENT, *supra* note 15, at 199 (noting “that lack of information is one factor that may contribute to the incomplete adoption of the best management practices”).

studies showing that family-friendly benefits produce positive returns for employees, employers, and the general public.

1. *Benefits to employees*

Researchers have found that when employers equip employees to balance their work-life needs more effectively, employees report greater satisfaction with their jobs.<sup>144</sup> They are also physically and mentally healthier<sup>145</sup> and less distracted and stressed by the demands of life outside of the workplace.<sup>146</sup> Importantly, data show that these positive effects are the same (or greater) for low-wage workers as for high-wage workers.<sup>147</sup>

2. *Benefits to employers*

Increasing employee satisfaction is good for employers. As Virgin noted when announcing its expanded parental leave policy, “[i]f you take care of your employees they will take care of your business. That is a philosophy that has served us well for more than four decades, and is the foundation of everything we do.”<sup>148</sup> Research supports Virgin’s conclusions; the presence of good work-life policies positively

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144. See Ellen Ernst Kossek & Cynthia Ozeki, *Bridging the Work-Family Policy and Productivity Gap: A Literature Review*, 2 COMMUNITY, WORK & FAM. 7, 14 (1999) (noting, for example, a positive correlation between flextime and an employee’s organizational commitment); GALINSKY, BOND & TAHMINCIOGLU, *supra* note 51, at 5–6 (finding that “better jobs and workplaces are associated with better life outcomes: less negative spillover from job to home, better physical health and better mental health”).

145. GALINSKY, BOND & TAHMINCIOGLU, *supra* note 51, at 5; see Lucy A. Peipins et al., *The Lack of Paid Sick Leave as a Barrier to Cancer Screening in Medical Care-Seeking*, 12 BMC PUB. HEALTH 520 (2012) (explaining that the lack of paid time off decreases an employee’s likelihood of obtaining preventative medical care).

146. See GALINSKY, BOND & TAHMINCIOGLU, *supra* note 51, at 5; see also Sharon Lerner & Eileen Appelbaum, *Business as Usual? New Jersey Employers’ Experiences with Family Leave Insurance*, CTR. FOR ECON. & POL’Y RES. 16 (2014), <http://www.cepr.net/index.php/publications/reports/business-as-usual-new-jersey-employers-experiences-with-family-leave-insurance> (reporting on the positive effects of family leave policy on employee morale and stress).

147. DANZIGER & BOOTS, *supra* note 28, at 7–8; see also JOAN C. WILLIAMS & PENELOPE HUANG, CTR. FOR WORKLIFE LAW, IMPROVING WORK-LIFE FIT IN HOURLY JOBS: AN UNDERUTILIZED COST-CUTTING STRATEGY IN A GLOBALIZED WORLD 3–4 (2011), <http://www.worklifelaw.org/pubs/ImprovingWork-LifeFit.pdf> (arguing that a lack of workplace flexibility leads to “serial quitting,” thereby raising employer costs); David Villano, *Work-Life Balance Benefits Low-Wage Workers, Employers*, PAC. STANDARD (Sept. 7, 2011), <http://www.psmag.com/business-economics/work-life-balance-benefits-low-wage-workers-employers-35733> (detailing how a good work-life balance benefits low-wage workers and employers).

148. Branson, *supra* note 1.

affects employee recruitment, retention, and productivity.<sup>149</sup> In a recent study, when asked about benefits, 88% of low-wage workers and 87% of high-wage workers said that, if they were considering a new job, having the flexibility to balance work and family would be “extremely” or “very” important.<sup>150</sup> Similarly, workers with access to family-friendly benefits have demonstrated a stronger commitment to their employer and are more likely to want to remain with that employer, thereby improving retention.<sup>151</sup> As the median cost to replace one employee is estimated at about 21% of that employee’s annual salary,<sup>152</sup> employers receive a substantial benefit by keeping workers who might otherwise be forced to quit.<sup>153</sup>

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149. See GALINSKY, BOND & TAHMINCIOGLU, *supra* note 51, at 2, 5–6 (reporting increases in retention, engagement, productivity, job performance, and customer service); THE COST OF DOING NOTHING, *supra* note 18, at 6 (detailing the costs to employers of inadequate family-work supports); see also California Paid Family Leave Law, CAL. UNEMP. INS. CODE §§ 3300–3306 (West 2013) (stating “systems that help families adapt to the competing interests of work and home not only benefit[] workers, but also benefit[] employers by increasing worker productivity and reducing employee turnover”).

150. See BOND & GALINSKY, WORKPLACE FLEXIBILITY, *supra* note 50, at 2 (calling the lack of work flexibility a “time famine”); see also BRAD HARRINGTON ET AL., THE NEW DAD: TAKE YOUR LEAVE 1 (2014), <http://www.bc.edu/content/dam/files/centers/cwf/news/pdf/BCCWF%20Executive%20Summary%20The%20New%20Dad%202014.pdf> (reporting that nearly nine of ten professional fathers stated that whether the employer provided paid paternity leave would be an important factor when looking for a new job).

151. See GALINSKY, BOND & TAHMINCIOGLU, *supra* note 51, at 5–6 (observing that “[h]aving more generous benefits is strongly related to employees’ plan to stay with their employers”); see also EILEEN APPELBAUM & RUTH MILKMAN, CTR. FOR ECON. & POLICY RESEARCH, LEAVES THAT PAY: EMPLOYER AND WORKER EXPERIENCES WITH PAID FAMILY LEAVE IN CALIFORNIA 1, 4–5 (2011), <http://cepr.net/documents/publications/paid-family-leave-1-2011.pdf> (reporting that low-wage workers who used California’s paid leave benefits were more likely to return to their same employer than those who did not use these benefits); EY, GLOBAL GENERATIONS: A GLOBAL STUDY ON WORK-LIFE CHALLENGES ACROSS GENERATIONS: DETAILED FINDINGS 20 (2015), [http://www.ey.com/Publication/vwLUAssets/EY-global-generations-a-global-study-on-work-life-challenges-across-generations/\\$FILE/EY-global-generations-a-global-study-on-work-life-challenges-across-generations.pdf](http://www.ey.com/Publication/vwLUAssets/EY-global-generations-a-global-study-on-work-life-challenges-across-generations/$FILE/EY-global-generations-a-global-study-on-work-life-challenges-across-generations.pdf) (finding that 86% of millennial workers reported that they would be less likely to leave an employer who offered paid parental leave and increased flexibility). Given the growing complexity of many entry-level jobs, improving retention and reducing turnover costs are significant benefits. See BOND & GALINSKY, HOURLY EMPLOYEES, *supra* note 76, at 6–7.

152. THE COST OF DOING NOTHING, *supra* note 18, at 27.

153. Employees without access to FWAs or paid leave must decide whether to give up income needed to support their families or to sacrifice time spent caring for a loved one when that person most needs it. Flextime and paid leave ensure that fewer workers are forced to make this choice.

In addition to avoiding turnover costs, retaining employees aids employers in other key ways. For instance, productivity increases when firms are able to retain experienced talent and to minimize the loss of firm-specific skills.<sup>154</sup> Employee productivity and performance also improve when workers can take better care of their own health and are less stressed and distracted by family responsibilities to which they cannot attend, rendering them more focused and engaged on the job.<sup>155</sup>

While understating the benefits that accrue from family-friendly workplace policies, employers tend to overstate the costs. For example, in the past, dire predictions of financial doom and gloom have not come to pass either because fewer employees than anticipated chose to take advantage of FWAs and leaves,<sup>156</sup> or the administrative costs were lower than expected.<sup>157</sup> In a comprehensive survey prepared for the Department of Labor in 2012, researchers found that three-quarters of

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154. See BOND & GALINSKY, *HOURLY EMPLOYEES*, *supra* note 76, at 6–7 (“Effective workplace flexibility is not seen [just] as an accommodation to employees’ needs and preferences but as a strategic management tool that can produce positive business results.”).

155. See *id.* at 7 (indicating that there is less of a spillover effect between both work and family life). Healthier employees reduce health-related costs and increases profits for employers. GALINSKY, BOND & TAHMINCIOGLU, *supra* note 51, at 6; Michelle M. Arthur & Allison Cook, *Taking Stock of Work-Family Initiatives: How Announcements of “Family-Friendly” Human Resource Decisions Affect Shareholder Value*, 57 INDUS. & LAB. REL. REV. 599, 602 (2004) (“Human resource theory suggests that the benefits of a work-family program will exceed the costs.”); Thomas J. Clifton & Edward Shepard, *Work and Family Programs and Productivity: Estimates Applying a Production Function Model*, 25 INT’L J. MANPOWER 714, 716 (2004) (pointing to the potential increased productivity as one reason why companies have boosted benefit programs in recent years); Christine Siegworth Meyer et al., *Work Family Benefits: Which Ones Maximize Profits?*, 13 J. MANAGERIAL ISSUES 28, 41 (2001) (“[The] sick leave option has a significant positive effect on profits . . . [seemingly because] the knowledge of its availability . . . increase[s] productivity in various ways.”).

156. See FMLA TECHNICAL REPORT, *supra* note 103, at ii, 161–62 (finding that 13% of all employees took FMLA leave in 2011, a rate that is unchanged from 2000, and that almost half of all leaves lasted ten days or less); see also Han & Waldfogel, *supra* note 110, at 198 (indicating that the FMLA has not had a significant effect on leave taking or leave length due in part to financial pressures that render unpaid leave unfeasible). There are several possible explanations for these numbers: it may be that demand for leave is just simply not as high as anticipated; that many employees find that unpaid leave is not financially feasible; or that leave is available in theory in some workplaces, but the workplace cultures do not support its use.

157. See FMLA TECHNICAL REPORT, *supra* note 103, at 48, 162 (finding that for a majority of worksites covered by the FMLA, administering the Act was easy and had either a positive effect or no noticeable effect on employees and their businesses). These factors are related. It could be that administrative costs are lower than expected because fewer employees than expected have taken FMLA leaves.



worksites covered by the FMLA said that administering the law was “easy,”<sup>158</sup> and very few covered worksites reported experiencing negative effects on business profitability or on “employee productivity, absenteeism, turnover, career advancement, [and] morale.”<sup>159</sup> Only 2.5% said they suspected employees had misused the FMLA.<sup>160</sup>

To be sure, FMLA leave is unpaid leave, which may result in fewer costs and fewer leaves.<sup>161</sup> However, employers in states with mandatory paid leave statutes also report “positive or neutral experiences and few negative effects.”<sup>162</sup> For example, in a survey regarding the effects of California’s paid family leave law, most employers reported that they could cover the work of employees on leave through temporary reassignments, and that they did not incur any new hiring or training costs.<sup>163</sup> More than 90% of these employers perceived no evidence of abuse of leave benefits.<sup>164</sup> Similarly, in a study conducted after Connecticut instituted its paid sick leave program, researchers found that employees did not abuse the program, and that approximately two-thirds of employers reported no cost increase or an increase of less than 2%.<sup>165</sup> Surveys of employers in New Jersey and in other cities and states have produced similar results.<sup>166</sup>

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158. *Id.* Large employers report higher administrative costs than smaller employers, with only 68% of the former saying that complying with the FMLA was somewhat easy, very easy, or had no noticeable effect. *Id.*

159. *Id.* at 162. Again, a higher percentage of large employers reported adverse effects. *Id.*

160. *Id.* at 156; *see also* DAVID CANTOR ET AL., BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: FAMILY AND MEDICAL LEAVE SURVEYS 6-4 (2000), <https://www.dol.gov/whd/fmla/chapter6.pdf> (acknowledging that the FMLA provides employers some discretion in administering leave, and reporting that one survey found that 92% of covered employers required their employees to provide some sort of documentation before taking leave for a serious health condition).

161. *See supra* notes 109–10 and accompanying text. Data show that the number of women using leave increased when California enacted a paid parental leave policy. *See* ECON. REPORT TO THE PRESIDENT, *supra* note 15, at 170.

162. THE COST OF DOING NOTHING, *supra* note 18, at 29.

163. *See* APPELBAUM & MILKMAN, *supra* note 151, at 7–9 (finding that nearly 87% of employers reported no cost increases).

164. *See id.* at 8 (clarifying that, among the 9% of employers who did report abuse, abuse was still a rare occurrence).

165. *See* Eileen Appelbaum, *Paid Sick Days in Connecticut Not a Burden for Employers*, CTR. FOR ECON. & POL’Y RES. (Apr. 7, 2014), <http://cepr.net/publications/op-eds-columns/paid-sick-days-in-connecticut-not-a-burden-for-employers> (noting that only one-third of employers actually saw an increase in the use of paid sick days).

166. *See* COUNCIL OF ECON. ADVISORS, *supra* note 17, at 16–18 (analyzing studies in California, Connecticut, and New York and concluding that “there is no business case for opposing sick days”); Lerner & Appelbaum, *supra* note 146, at 30 (providing

It is important to note that the cost of providing benefits like paid leave can, in some cases, be significantly reduced by having employees share the expenses. For example, in California, New Jersey, Rhode Island, and New York—states with paid family leave programs—employees make (or “will make,” in the case of New York)<sup>167</sup> very small payroll contributions to fund the programs.<sup>168</sup> This arrangement serves to spread costs broadly and to limit the burdens placed on both individual employees and employers.<sup>169</sup>

The above data suggest that an extension of benefits to low-wage employees will have a negligible effect on employment opportunity.<sup>170</sup> An important corollary supporting this position comes from research surrounding the effects of raising the minimum wage.<sup>171</sup> Previous increases to the minimum wage have not decreased employment levels.<sup>172</sup> This is because the costs of increased wages have largely

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that most employers saw the New Jersey’s Family Leave Insurance program as a “non-event” that had no impact on their operations).

167. See Lerner & Appelbun, *supra* note 146, at 7 (“[W]orkers in California, New Jersey and Rhode Island now receive partial wage replacement during family and medical leaves. New York and Hawaii are now considering legislation to establish a family leave insurance program.”).

168. For discussion of these programs, see *infra* Section IV.B.

169. Another idea would be to have a government funded, federally administered system of benefits. See ECON. REPORT TO THE PRESIDENT, *supra* note 15, at 200 (observing that “if flexible arrangements were . . . part of a Federal program, costs would be spread out among employers, making such offerings more beneficial for them” and “employers who refuse to provide flexibility . . . [would be prevented] from pricing their goods and services lower than competitors who do provide flexibility”).

170. Indeed, many economists argue that increasing benefits will not negatively affect employment prospects. See Charles L. Baum II, *The Effect of State Maternity Leave Legislation and the 1993 Family and Medical Leave Act on Employment and Wages*, 10 LAB. ECON. 573, 573 (2003), <http://www.sciencedirect.com/science/article/pii/S092753710300037X> (finding that “maternity leave legislation has small and statistically insignificant effects on employment and wages”); Jane Waldfogel, *The Impact of the Family and Medical Leave Act*, 18 J. POL’Y ANALYSIS & MGMT. 281, 281 (1999), [http://econpapers.repec.org/article/wlyjpamgt/v\\_3a18\\_3ay\\_3a1999\\_3ai\\_3a2\\_3ap\\_3a281-302.htm](http://econpapers.repec.org/article/wlyjpamgt/v_3a18_3ay_3a1999_3ai_3a2_3ap_3a281-302.htm) (finding an increase in usage after the FMLA, but “no significant negative effects on women’s employment or wages”). But see de Rugy, *supra* note 139 (discussing the work of economist Jonathan Gruber).

171. Recent minimum wage increases in Maine, Washington, and elsewhere will give economists yet another opportunity to study these effects. Ben Casselman, *Low-Wage Workers Are Getting a Raise, and Economists Are Getting an Experiment*, FIFTYTHREE (Jan. 3, 2017, 2:38 PM), <https://fivethirtyeight.com/features/low-wage-workers-are-getting-a-raise-and-economists-are-getting-an-experiment>; see *infra* note 263.

172. See JOHN SCHMITT, CTR. FOR ECON. & POLICY RESEARCH, WHY DOES THE MINIMUM WAGE HAVE NO DISCERNIBLE EFFECT ON EMPLOYMENT? 2 (2013), <http://cepr.net/documents/publications/min-wage-2013-02.pdf> (detailing a host of

been offset by benefits accruing from decreased employee turnover.<sup>173</sup> While the effects of greater benefits on low-wage employment have received less study (perhaps because these benefits largely do not exist), as noted above, the states that have implemented paid family-friendly policies have not shown patterns of diminishing employment or crippling economic costs.<sup>174</sup> The prevalence of family-friendly policies in many other developed and thriving economies<sup>175</sup> also suggests that these policies would not invite an economic apocalypse.

### 3. *Benefits to society*

Beyond benefitting employees and employers, reducing the benefits gap will help the broader society. When workers are able to use FWAs or paid leaves to keep their jobs, they rely less on public assistance<sup>176</sup> and inject more money into their local economies.<sup>177</sup> Family-friendly benefits also advance gender equality because they challenge the notion that the ideal worker is one without familial responsibilities (or one whose family responsibilities are handled by

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research that has shown virtually no employment decreases from an increase in the minimum wage); *Over 600 Economists Sign Letter in Support of \$10.10 Minimum Wage*, ECON. POLICY INST. (Jan. 14, 2014), <http://www.epi.org/minimum-wage-statement>. But see Mark Adams, *Raising the Minimum Wage Hurts the Poor*, U.S. NEWS & WORLD REP. (Mar. 11, 2013, 12:35 PM), <http://www.usnews.com/opinion/blogs/economic-intelligence/2013/03/11/raising-the-minimum-wage-wont-help-the-poor> (“The minimum wage is more likely to hurt the people it is supposed to help by making it harder for them to find jobs.”).

173. See SCHMITT, *supra* note 172, at 22–23 (“[P]robably the most important channel of adjustment [to minimum wage increases] is through reductions in labor turnover, which yield significant cost savings to employers.”). Other costs savings have come through cuts to benefits and hours. But researchers have found these cuts to be fairly limited. *Id.*

174. See *supra* notes 162–66 and accompanying text.

175. See *supra* notes 37–42 and accompanying text.

176. THE COST OF DOING NOTHING, *supra* note 18, at 16 (noting that 15% of workers in the Department of Labor’s FMLA survey who received partial or no pay during their leave reported going on public assistance); LINDA HOUSER & THOMAS P. VARTANIAN, CTR. FOR WOMEN & WORK, PAY MATTERS: THE POSITIVE ECONOMIC IMPACTS OF PAID FAMILY LEAVE FOR FAMILIES, BUSINESSES AND THE PUBLIC 1, 2 (2012) (reporting that new mothers who took paid parental leave were 39% less likely to receive public assistance in the year following their child’s birth).

177. When workers are forced to quit their jobs or to take leave without pay, they have less to spend on household expenses such as groceries, rent, and other bills. See FMLA TECHNICAL REPORT, *supra* note 103, at 105 (finding that 84% of workers who took partially paid or unpaid leave limited their spending, while almost 37% delayed paying some bills).

someone other than the worker).<sup>178</sup> Briefly, the “ideal worker” norm contributes to workplace practices that ignore or insufficiently account for work-life conflicts. The ensuing absence of workplace flexibility and adequate benefits push some women out of the job market or into part-time work. It also discourages fathers from being equal partners in childrearing because, historically, men have earned more than women. Thus, if one parent has to make work adjustments to accommodate family needs, a couple may rationally decide that the lower earner should do so. This decision may also be influenced by continuing social stereotypes of men as breadwinners and women as caregivers.<sup>179</sup>

The provision of family-friendly benefits has the potential to neutralize some of these factors and to increase labor force participation rates for women who choose to work or who work by necessity.<sup>180</sup> The U.S. Department of Labor reports that from 1990 to

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178. See JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 1–6, 24 (2000) (describing feminist challenges to domesticity and the notion that an ideal worker is someone “with immunity from family work”). To be sure, addressing workplace restrictions is only a partial solution to gender inequality as women face a series of other structural impediments that limited their opportunities. See generally BISO-M-RAPP & SARGEANT, *supra* note 92 (delineating the numerous structural barriers that produce and reinforce gender inequality throughout women’s lifetimes).

179. For discussion of these variables, see generally JOAN C. WILLIAMS, RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER (2010) (examining workplace structures and stereotypes that influence men and women’s employment opportunities).

180. For example, access to paid maternity leave has been shown to positively affect women’s labor force participation and earnings. See Michael Baker & Kevin Milligan, *How Does Job-Protected Maternity Leave Affect Mothers’ Employment?*, 26 J. LAB. ECON. 655, 660 (2008) (reporting that the ability to take paid leave increased the employment rate of women “with children aged 0–2 and increased the probability of returning to work within 2 years of birth”); Heather Boushey, *Family-Friendly Policies: Helping Mothers Make Ends Meet*, 66 REV. SOC. ECON. 51, 52, 59, 61 (2008) (finding that women who took paid maternity leave had later wages that were about 9% higher than women who did not have this option—and who thus had to take unpaid leave, quit, or take no leave); JANE WALDFOGEL, YOSHIO HIGUCHI & MASAHIRO ABE, CTR. FOR ANALYSIS OF SOC. EXCLUSION, LONDON SCH. OF ECON., MATERNITY LEAVE POLICIES AND WOMEN’S EMPLOYMENT AFTER CHILDBIRTH: EVIDENCE FROM THE UNITED STATES, BRITAIN, AND JAPAN 1, 7 (1998), <http://sticerd.lse.ac.uk/dps/case/cp/Paper3.pdf> (reporting that 64% of women covered by maternity leave returned to their employers within one year of giving birth). Paid leave increases the likelihood that women will remain employed and return to work after childbirth. It also decreases career interruptions, which can have a negative cumulative effect on women’s salaries over time. See THE COST OF DOING NOTHING, *supra* note 18, at 20 (observing that the effects of “career interruptions, early exit, and lower wages can continue to

2010, the United States fell from sixth to seventeenth place “among OECD [Organisation for Economic Co-operation and Development] countries in its rate of female labor force participation—and researchers have attributed [29%] of this decrease” to the United States’ comparatively weak family-friendly policies.<sup>181</sup> The Department’s chief economist estimates that

if U.S. women between 25 and 54 participated in the labor force at the same rate as they do in Canada or Germany, there would be more than five million more women in the labor force in the U.S., which would translate into more than \$500 billion of additional economic activity per year.<sup>182</sup>

In addition to these positive effects, providing family-friendly benefits to *both* men and women would also advance gender equality by increasing men’s engagement in childcare.<sup>183</sup> Such engagement would (1) challenge stereotypes of men as “breadwinners,” largely uninterested in childrearing; and (2) facilitate a more equitable division of labor in the home.<sup>184</sup> All these effects inure to the good of children, whose parents would be better situated to earn a living while simultaneously providing quality care.<sup>185</sup>

In summary, family-friendly benefits exact some costs on employers, and these costs will likely increase with a larger number of covered employees and potential requests. The essential question, however, is whether the resulting benefits outweigh the costs. While one cannot answer this question definitively for all employers,<sup>186</sup> research suggests

penalize workers into retirement” because those workers are less able to save for retirement or to contribute to Social Security).

181. THE COST OF DOING NOTHING, *supra* note 18, at 30.

182. *Id.* (emphasis omitted). The Department of Labor thus concludes that “doing nothing on paid leave is likely hurting the U.S. national economy.” *Id.*

183. For example, studies show that men who took two weeks or more of paternity leave were much more likely to be actively involved in their child’s care nine months after birth, including feeding, changing diapers, and getting up at night. Lenna Nepomnyaschy & Jane Waldfogel, *Paternity Leave and Fathers’ Involvement with Their Young Children: Evidence from the American Ecls-B*, 10 CMTY., WORK & FAM. 427, 442, 447 (2007).

184. THE COST OF DOING NOTHING, *supra* note 18, at 23–24 (positing that increased use of paternity leave encourages gender balance among couples in household chores and childcare).

185. For example, maternity leave has been linked to decreases in infant mortality and premature birth rates, as well as increases in birth weights. *See id.* at 5 (noting that maternity leave is also associated with an increased duration of breastfeeding).

186. *See* ECONOMIC REPORT TO THE PRESIDENT, *supra* note 15, at 200 (observing that because “existing studies . . . come from firms that have already adopted [flexible arrangements], the evidence [concerning their positive effects] may overstate the economic benefits that some firms without flexible arrangements would enjoy if such

that as a general matter the benefits are considerable and, in many cases, exceed the costs. Given these results, extending work-life programs to low-wage workers should not be rejected out of hand. These programs need not be viewed automatically as a net loss for employers.<sup>187</sup> Instead, as researchers at the Family and Work Institute found, they should be seen as “strategic management tool[s] that can produce positive business results.”<sup>188</sup> Furthermore, given the broader benefits to society, measures to ensure that employers do not bear all of the costs can be explored and utilized.

*B. Competition (The Law of Supply and Demand)*

While the cost-benefit analysis set forth in Section A would suggest that more employers should offer benefits to low-wage workers, they have not done so.<sup>189</sup> Some argue that this failure can be explained by the law of supply and demand.<sup>190</sup> Put simply, the argument is that the limited supply of high-wage workers requires that employers compete aggressively for these employees by offering greater benefits. For example, within the technology industry, one commentator has observed,

Some workers are harder to hire and retain than others. With Silicon Valley booming these days, attracting and retaining tech talent is increasingly a challenge. That’s why you see tech companies falling over themselves to offer bigger salaries and better parental leave benefits, at least to a select group of employees.<sup>191</sup>

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flexibility were widely adopted”); Secret, *supra* note 73, at 217–18 (noting that a problem with many studies is they do not examine employee utilization and do not answer the question of whether the actual use of benefits, or the mere existence of the benefit options within a company, is responsible for positive employer outcomes).

187. To the extent that benefits inure to the broader public, then cost-sharing mechanisms are possible. See *supra* Section III.A.3 (explaining the benefits to society) and notes 167–69 and accompanying text (discussing possible cost-sharing methods).

188. BOND & GALINSKY, HOURLY EMPLOYEES, *supra* note 76, at 7. As Joe Wallis, the Senior Diversity Program Manager for Microsoft Military Recruiting, noted recently, “since we’ve implemented workplace flexibility, company data indicate that operating costs have gone down and sales have increased, and employee retention and job satisfaction have also improved. We can point to the return on investment related to workplace flexibility.” ADVANCING WORKPLACE FLEXIBILITY, *supra* note 85, at 14.

189. See Villano, *supra* note 147 (highlighting that low-wage employees are often the ones with the most needs but the fewest benefits).

190. See Peck, *supra* note 8 (“The rarer the skills you bring, the more people offer for those skills.” (quoting Ken Matos, Senior Researcher at the Families and Work Institute)).

191. *Id.*

An important corollary to this argument is that low-wage workers are plentiful, indeed a dime a dozen, and their services are more fungible.<sup>192</sup> Thus, it is argued that employers perceive less of a need to offer incentives to attract and retain these workers, particularly when unemployment is high and labor markets are soft.<sup>193</sup>

The competition argument may indeed explain, at least in part, the dearth of benefits for low-wage workers.<sup>194</sup> Some indicators suggest that the current supply of low-wage workers exceeds the demand for their labor. For example, the unemployment gap between high- and low-income families is higher than ever.<sup>195</sup> In 2013, unemployment for the lowest-income families (those making under \$20,000 a year) was over 21%.<sup>196</sup> By contrast, the unemployment rate for the wealthiest households was at 3.2%, which is “traditionally defined as full employment.”<sup>197</sup> Furthermore, in 2013, unemployment rates for workers with a high school diploma tripled that of workers with an advanced degree.<sup>198</sup>

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192. See BOND & GALINSKY, *WORKPLACE FLEXIBILITY*, *supra* note 50, at 1.

193. *Id.*

194. As noted earlier, the benefits gap between high- and low-wage workers is part of a larger benefits crisis in the United States. See *supra* note 45. The United States tends to provide dramatically fewer work-life benefits than its peers in developed economies. See *supra* notes 38–42 and accompanying text. The competition argument does not explain why more employers have not extended family-friendly benefits to high- and middle-wage employees. That question, however, is not the focus of this Article. This work seeks only to explain the differential treatment of high- and low-wage employees. Note also that the competition argument is limited to the extent that it treats low-wage workers as if they are a monolith. For additional discussion of this point, see *infra* text accompanying note 259.

195. See Associated Press, *Gap in U.S. Unemployment Rates Between Rich and Poor Continues to Widen*, NJ.COM (Sept. 16, 2013, 8:43 AM), [http://www.nj.com/business/index.ssf/2013/09/gaps\\_in\\_us\\_unemployment\\_rates.html](http://www.nj.com/business/index.ssf/2013/09/gaps_in_us_unemployment_rates.html).

196. *Id.*

197. *Id.* An alternative explanation for the data would be that low-income persons are not looking for employment. Thus, the argument would be that jobs exist, but workers are not seeking them. Most economists and statisticians, however, would find this explanation inadequate given the wealth differential referenced in the above text.

198. Heidi Shierholz, *Is There Really a Shortage of Skilled Workers?*, ECONOMIC POLICY INST. (Jan. 23, 2014), <http://www.epi.org/publication/shortage-skilled-workers>; see also *Employment Projections: Earnings and Unemployment Rates by Educational Attainment, 2015*, U.S. DEP'T OF LAB., BUREAU OF LAB. STAT., [http://www.bls.gov/emp/ep\\_chart\\_001.htm](http://www.bls.gov/emp/ep_chart_001.htm) (last modified Mar. 15, 2016) (showing that the unemployment rate decreased by 2015 but the gap persisted). Some may argue for an industry or job-specific assessment of the competition argument because it is not always the case that the demand for high-wage workers exceeds the supply of workers. For example, recently the supply of lawyers exceeded the demand for their services. Joshua Wright, *The Job Market for Lawyers: Side Work on the Rise Amid Continuing Glut of New*

These disparities in employment rates exist despite the fact that the number of low-wage jobs in the United States has increased over the past two decades,<sup>199</sup> particularly after the Great Recession of 2007–2009, when the number of low-wage jobs rose while the number of middle-wage jobs fell.<sup>200</sup> Some experts suggest that as the number of low-wage positions increased, so too did the number of low-wage workers as former middle-wage (semi-skilled) workers lost their jobs and were forced into the low-wage workforce.<sup>201</sup> Thus, while there is more demand for low-wage labor, because of the increased supply of laborers, this demand has not resulted in higher salaries or more benefits for low-wage workers.<sup>202</sup>

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*Grads*, FORBES (Jan. 10, 2014), <http://www.forbes.com/sites/emsi/2014/01/10/the-job-market-for-lawyers-side-work-on-the-rise-amid-continuing-glut-of-new-grads>. The data show, however, that the supply of workers generally exceeds the demand for their labor in almost all low-wage jobs and demand generally exceeds supply in almost all high-wage positions, even if it is not true in all cases.

199. In 1996 and 1999, the percentage of the U.S. workforce considered low-wage was twenty-five and twenty-eight, respectively. OFFICE OF THE ASSISTANT SEC'Y FOR PLANNING & EVALUATION, U.S. DEP'T OF HEALTH & HUMAN SERVS., WHO ARE LOW-WAGE WORKERS? (2009), <https://aspe.hhs.gov/basic-report/who-are-low-wage-workers>. By 2001, that number had increased to 31%. *Id.*; see also DAVID AUTOR, CTR. FOR AM. PROGRESS, THE POLARIZATION OF JOB OPPORTUNITIES IN THE U.S. LABOR MARKET 2 (2010), <http://economics.mit.edu/files/5554> ("Employment growth is polarizing, with job opportunities concentrated in relatively high-skill, high-wage jobs and low-skill, low-wage jobs."); Paul Beaudry et al., *The Great Reversal in the Demand for Skill and Cognitive Tasks* 22 (Nat'l Bureau of Econ. Research, Working Paper No. 18,909, 2013), <http://www.nber.org/papers/w18901.pdf> ("The relative growth of the lowest percentile occupations becomes very strong after 2000.").

200. Middle-wage jobs accounted for 60% of job losses during the Great Recession, while lower-wage jobs accounted for only 21% of jobs lost. NAT'L EMP'T LAW PROJECT, *supra* note 21, at 2. However, mid-wage jobs only accounted for 22% of the jobs regained after the recession, while low-wage jobs made up 58% of recovery jobs. *Id.* Recent data suggest that this trend may be changing. Patrick Gillespie, "Tide Has Begun to Turn" on Middle Class Jobs, CNN MONEY (Aug. 19, 2016, 11:45 AM), <http://money.cnn.com/2016/08/19/news/economy/middle-class-jobs-ny-fed/index.html> (noting that while "[f]or years, job growth was strongest in high-wage and low-wage jobs, . . . the U.S. economy may now be shifting gears toward more middle class jobs"); Nelson D. Schwartz, *Middle-Income Jobs Finally Show Signs of a Rebound*, N.Y. TIMES (Aug. 18, 2016), [https://www.nytimes.com/2016/08/19/business/economy/middle-income-jobs-finally-show-signs-of-a-rebound.html?\\_r=0](https://www.nytimes.com/2016/08/19/business/economy/middle-income-jobs-finally-show-signs-of-a-rebound.html?_r=0).

201. See Beaudry, *supra* note 199, at 2 ("[H]igh-skilled workers have moved down the occupational ladder and have begun to perform jobs traditionally performed by lower-skilled workers."); Gillespie, *supra* note 200 (discussing how gains in middle-wage jobs lagged behind low- and high-wage jobs growth following the Great Recession).

202. Low-wage workers have experienced stagnant or decreasing wages since the 1970s. LAWRENCE MISHEL, ECON. POLICY INST., CAUSES OF WAGE STAGNATION 1 (2015), [http://www.epi.org/files/2013/causes\\_of\\_wage\\_stagnation.pdf](http://www.epi.org/files/2013/causes_of_wage_stagnation.pdf). Furthermore, even



The above data help to explain why many employers do not offer flexibility and benefits to low-wage workers. If the supply of low-wage workers exceeds the demand for their labor, then employers will not be incentivized to provide benefits to this group. This analysis also underscores the vulnerability of low-wage workers as these same market forces deprive low-wage workers of bargaining power. That is, the excess supply of low-wage labor decreases the ability of low-wage workers to advocate effectively for themselves. These employees cannot realistically push back against employment packages or negotiate for better terms because they risk either not being hired or being terminated<sup>203</sup> as, with a glut of available laborers, employers readily have access to less demanding (or more desperate) alternative or replacement workers. The declining power of unions has only aggravated the situation.<sup>204</sup> In effect, low-wage workers have little real choice or power in the current labor market.<sup>205</sup> When one considers that these workers face greater financial and familial pressures than their high-wage counterparts,<sup>206</sup> the need for some form of structural intervention to disrupt the status quo is apparent.

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when factoring in employer-provided benefits like paid leave, contributions to retirement funds, and health-care insurance, low-wage workers have received less total compensation growth compared to their higher paid counterparts. AUTOR, *supra* note 199, at 6; see *Compensation Inequality: Evidence from the National Compensation Survey*, U.S. DEP'T OF LAB., BUREAU OF LAB. STAT. (July 2015), <https://www.bls.gov/opub/mlr/2015/article/compensation-inequality-evidence-from-the-national-compensation-survey.htm>.

203. In addition to termination, employees who press for greater benefits may risk other forms of retaliation, such as less favorable shifts, a decreased likelihood of being promoted, and fewer pay increases. Deborah Maranville, *Workplace Mythologies and Unemployment Insurance: Exit, Voice and Exhausting All Reasonable Alternatives to Quitting*, 31 HOFSTRA L. REV. 459, 493 (2002).

204. For a discussion of the decline of unions in the United States, see *infra* Section IV.A.

205. The tenuous nature of at-will employment adds to the economic marginality of low-wage workers. In at-will employment arrangements, excepting actions that violate public policy, employers can terminate employees for any reason or for no good reason at all. To balance the employer's freedom, employees can quit at any time and for any reason. The problem for low-wage workers is that if their bargaining power is limited to begin with because they are easily replaceable, then at-will employment strongly favors the employer and discourages low-wage workers from "making a fuss."

206. As noted in Part I, most low-wage workers are the primary breadwinners for their families. Many are unmarried and without spousal or other means of support. See *supra* text accompanying notes 63–64.

*C. Skills, Value, and Class Bias*

Sections A and B of this Part evaluated the cost and competition explanations and demonstrated how market forces likely affect employer incentives. This Section examines the ways in which views about the value of low-wage work, and the skill level and class status of low-wage workers, may influence employer decision making. It begins by considering the argument that low-wage workers receive fewer benefits because they are less skilled and their work is less valuable. It then explores the role of class bias in furthering the benefits gap.

*1. Low-wage = less skilled and less valuable work*

*“It’s not like if you run a fast food company you’re hiring graduates of MIT or people that were gonna go work for Microsoft, you know. In the employment pool, you’re hiring the best of the worst. You know, it’s kind of the bottom of the pool. And at Hardee’s it was so bad, we were hiring the worst of the worst and hoping they would stay.”*

—Andrew Puzder, CEO of CKE Restaurants and Donald Trump’s  
Nominee for Secretary of Labor<sup>207</sup>

Some argue that workers are paid commensurate with their talents and the overall value of their contributions.<sup>208</sup> Thus, because low-wage work is presumably less skilled and less socially valuable, employers compensate low-wage workers at a lower rate. Conversely, because high-wage work is presumably more skilled and more socially valuable, employers compensate high-wage workers at a higher rate. Inherent in this explanation is the idea that if a worker invests in higher education or the acquisition of advanced skills, then she should receive a commensurate return on her investment with better employment terms and conditions, including higher wages and greater benefits.<sup>209</sup>

Like the cost and competition arguments, the skill/value explanation is intuitively appealing, particularly given that low-wage workers in general have less formal education than high-wage

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207. Andrew Kaczynski, *Trump Labor Pick in 2011 on His Fast-Food Workers: We Hire The Best of the Worst*, CNN MONEY (Jan. 23, 2017, 5:03 PM), <http://money.cnn.com/2017/01/23/news/kfile-puzder-best-of-the-worst/index.html>.

208. Pursuant to this explanation, benefits are simply another form of compensation.

209. In short, the argument is that if low-wage workers roll up their sleeves, get busy, and acquire more skills, they too will have more to offer society and will receive greater benefits. Because many low-wage workers work multiple jobs just to make ends meet, one wonders when they are supposed to have time for this extra work.

workers.<sup>210</sup> Yet, for several reasons, the skill/value explanation neither explains the size of the benefits gap, nor justifies doing nothing about it. First, the assumed linear correlation between skills/value and compensation must be examined. One study shows that if wages for low-wage workers grew at the same rate as their productivity, the minimum wage would have grown from roughly \$9.40 (in 2013 dollars) in 1968 to \$18.30 per hour in 2013.<sup>211</sup> (The federal minimum wage was \$7.25 in 2013.)<sup>212</sup> Such data suggest that the perceived value of low-wage work (as measured by wages) has actually dropped in recent years even as low-wage productivity has increased. In pushing back against the assumed correlation between skills/value and compensation, one might also point out that primary and secondary school teachers arguably offer a more valuable service to society than professional athletes, yet teacher salaries are not commensurate with the value of their work.<sup>213</sup>

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210. See *supra* text accompanying note 62. It bears remembering that 35.5% of low-wage workers have a high school diploma and at least 45.5% have some postsecondary education. See *supra* note 62.

211. DAVID COOPER, ECON. POLICY INST., RAISING THE FEDERAL MINIMUM WAGE TO \$10.10 WOULD LIFT WAGES FOR MILLIONS AND PROVIDE A MODEST ECONOMIC BOOST 6 (2013), <http://www.epi.org/files/2014/EPI-1010-minimum-wage.pdf>; see also *The Benefits of Collective Bargaining: An Antidote to Wage Decline and Inequality*, ECON. POLICY INST. (Apr. 14, 2015), <http://www.epi.org/publication/benefits-of-collective-bargaining> (finding that in the United States, “output of goods and services per hour worked (productivity, net of depreciation) grew [64%] from 1979 to 2014, while the inflation-adjusted hourly wage of the typical worker rose by just [6%]”); see also BISOM-RAPP & SARGEANT, *supra* note 92, at 3 (noting that in the United States, “real hourly productivity since 1980 increased 86 per cent but that growth was accompanied by an increase in real hourly wages of only 35 per cent” and that low- and semi-skilled workers were particularly harmed by this development). Some groups push back against this conclusion, arguing that the minimum wage has kept up with productivity. See, e.g., JAMES SHERK, HERITAGE FOUND., PRODUCTIVITY AND COMPENSATION: GROWING TOGETHER 15 (2013), <http://www.heritage.org/research/reports/2013/07/productivity-and-compensation-growing-together>. Sherk, a Senior Policy Analyst at the Heritage Foundation, maintains that any allegations to the contrary ignore (1) performance-based cash pay; (2) bonuses; and (3) other benefits provided by employers, such as health insurance/paid leave. *Id.* at 5–7. The problem with Sherk’s analysis is that low-wage workers are unlikely to receive any of these things. Thus, the productivity-wage gap is likely very real for this class of workers.

212. *Minimum Wage*, U.S. DEP’T OF LAB., <https://www.dol.gov/general/topic/wages/minimumwage> (last visited Feb. 5, 2017).

213. In 2012–2013, the average annual salary for public elementary and secondary school teachers was \$56,383. *Tbl. 211.60: Estimated Average Annual Salary of Teachers in Public Elementary and Secondary Schools, by State*, NAT’L CTR. FOR EDUC. STAT. (Apr. 2013), [http://nces.ed.gov/programs/digest/d13/tables/dt13\\_211.60.asp](http://nces.ed.gov/programs/digest/d13/tables/dt13_211.60.asp). In 2013–2014, the average salary for an NBA player was \$4.9 million; for a MLB player, it was

Even when a linear correlation between skills/value and compensation exists, there is still plenty of room to question whether the relationship between these variables is proportional. For example, while CEOs of Fortune 500 companies may have greater skills than the average worker in their companies, it is doubtful that their skills are 350 times greater than those of the average worker (which by some estimates is the difference between CEO pay and that of the average worker).<sup>214</sup>

In addition to questioning whether compensation is proportionate to skill and value, one must also carefully examine another premise of the skill/value argument—the notion that workers should invest in themselves to earn greater benefits. Although society certainly benefits from having mechanisms in place to incentivize individuals to augment their human capital,<sup>215</sup> it bears remembering that economic mobility is much more difficult to achieve in the United States than is commonly believed.<sup>216</sup> In addition, low-wage workers are in sectors of the economy—such as retail and service jobs—that will continue to demand large numbers of workers. Globalization and outsourcing are unlikely to eliminate the need for these jobs because only a small percentage are in industries that compete

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\$3.82 million; for a NHL player, it was \$2.6 million; and for an NFL player, it was \$2 million. Kurt Badenhausen, *Average MLB Player Salary Nearly Double NFL's, but Still Trails NBA's*, FORBES (Jan. 23, 2015, 11:01 AM), <http://www.forbes.com/sites/kurtbadenhausen/2015/01/23/average-mlb-salary-nearly-double-nfls-but-trails-nba-players>.

214. OXFAM AMERICA, *supra* note 29, at 1 (calculating that in 2013, the “CEO-to-average-worker pay ratio was 331 to 1; 30 years ago, it was just 40 to 1”); Roberto A. Ferdman, *The Pay Gap Between CEOs and Workers is Much Worse than You Realize*, WASH. POST (Sept. 25, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/09/25/the-pay-gap-between-ceos-and-workers-is-much-worse-than-you-realize>.

215. See Michael Selmi, *Unions, Education, and the Future of Low-Wage Workers*, 2009 U. CHI. LEGAL F. 147, 148 (arguing for education as a “labor strategy” to improve job prospects for low-wage workers).

216. See PABLO A. MITNIK & DAVID B. GRUSKY, PEW CHARITABLE TRUSTS, ECONOMIC MOBILITY IN THE UNITED STATES 5 (2015), [http://www.pewtrusts.org/~media/assets/2015/07/fsm-irs-report\\_artfinal.pdf](http://www.pewtrusts.org/~media/assets/2015/07/fsm-irs-report_artfinal.pdf) (finding that “children raised in low-income families will probably have very low incomes as adults, while children raised in high-income families can anticipate very high incomes as adults”); Jim Tankersley, *Economic Mobility Hasn't Changed in a Half-Century in America, Economists Declare*, WASH. POST (Jan. 23, 2014), [https://www.washingtonpost.com/business/economy/economic-mobility-hasnt-changed-in-a-half-century-in-america-economists-declare/2014/01/22/e845db4a-83a2-11e3-8099-9181471f7aaf\\_story.html](https://www.washingtonpost.com/business/economy/economic-mobility-hasnt-changed-in-a-half-century-in-america-economists-declare/2014/01/22/e845db4a-83a2-11e3-8099-9181471f7aaf_story.html) (comparing economic mobility in the United States to countries such as Canada or Denmark, where mobility is much easier).

globally.<sup>217</sup> Indeed, many of the manufacturing workers that have been displaced by globalization have ended up in sectors of the economy dominated by low-wage jobs.<sup>218</sup> Thus, even if it were possible for some low-wage workers “to work their way into better jobs,” 20% or more of the labor force would still consist of low-wage jobs. Given these structural realities, “individual mobility” and investments in human capital alone will not solve the benefits gap.

## 2. *Stereotypes and biases*

While the aforementioned aspects of the skill/value explanation are ostensibly neutral, one must consider whether a more insidious variable is also at play. The following Sections situate low-wage workers in the larger narrative concerning inequality in the United States and explore the ways in which negative stereotypes related to their class, race, and gender shape the allocation of benefits. These Sections ask: Are low-wage workers denied benefits because they are in a “different class of care?”

### a. *Class bias*

It is fairly common knowledge that economic inequality in the United States has increased in recent decades.<sup>219</sup> To be sure, some

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217. Most low-wage workers perform their work in a specific location, where a customer, child, or patient is located (e.g., food preparers, cashiers, health-care aides, and retail clerks). In addition, the transformation of the U.S. economy from manufacturing to service will require the continued hiring of large numbers of service workers. As one commentator has observed,

Employers will hire nearly twice as many food-service workers as software engineers, hire as many cashiers as they do computer-support specialists and hire more than twice the number of customer-service representatives as they do computer systems analysts. The reskilling approach will do little to improve the lives of most workers in these low-wage jobs . . . . What these workers need is to be adequately rewarded for the skills they already possess.

*Facts About Low Wage Work*, LOW WAGE WORK, <http://www.lowwagework.org/facts-about-low-wage-work.html> (last visited Feb. 5, 2017).

218. Binyamin Appelbaum, *The Millions of Americans Donald Trump and Hillary Clinton Barely Mention: The Poor*, N.Y. TIMES (Aug. 11, 2016), <https://www.nytimes.com/2016/08/12/us/politics/trump-clinton-poverty.html> (quoting economists from the Center on Budget and Policy Priorities stating manufacturing workers end up in low-end service jobs).

219. There is more space between those at the top and those at the bottom of the U.S. economic hierarchy, and people at the top tend to improve their economic positions at a faster rate, and with greater success, than those at the bottom. See generally ESTELLE SOMMEILLER & MARK PRICE, *THE INCREASINGLY UNEQUAL STATES OF AMERICA: INCOME INEQUALITY BY STATE, 1917 TO 2012*, at 12–14 (2015), <http://www.thenation.com/wp-content/uploads/2015/04/IncreasinglyUnequalSta>

politicians, policy makers, and advocacy groups have expressed concern about this development.<sup>220</sup> Yet, their attention has focused largely on the “middle-class”; economic inequality for low-wage workers has received little air time.<sup>221</sup> It could be that by concentrating on the middle-class, politicians and advocacy organizations are attempting to appeal to the broadest array of citizens or to swing voters. But, it could also be that low-wage workers receive little attention because they are viewed as somehow having failed, in this land of plenty, to develop skills or to seize opportunities that would lead to better lives.<sup>222</sup> In other words, they are blamed for their plights. This blame game likely affects any evaluation of their needs for accommodation and assistance in the workplace. In short, if society deems low-wage workers irresponsible, undeserving, and insufficiently ambitious,<sup>223</sup> then these workers become targets of disdain, instead of victims of a system—including an employment

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tesofAmerica1917to2012.pdf (reporting that since the late 1970s, “unequal income growth” in the United States has elevated the top 1% income share to near its peak in 1928). Consequently, income distribution today is highly concentrated at the top, with the top 1% of the population earning more than 20% of all income and the top 10% earning almost half of all income. Annie Lowrey, *The Rich Get Richer Through the Recovery*, N.Y. TIMES: ECONOMIX (Sept. 10, 2013, 3:25 PM), <http://economix.blogs.nytimes.com/2013/09/10/the-rich-get-richer-through-the-recovery>.

220. President Barack Obama, for example, gave a speech in 2013 in which he decried the “dangerous and growing inequality and lack of upward mobility that has jeopardized middle-class America’s basic bargain.” *Remarks by the President on Economic Mobility*, WHITE HOUSE (Dec. 4, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/12/04/remarks-president-economic-mobility>. In addition, Hillary Clinton made income inequality an issue in her 2016 presidential campaign, as did Senator Bernie Sanders during the Democratic primary. See *The Middle Class Needs A Raise. Here’s How Hillary Clinton Plans to Do It.*, HILLARY CLINTON (May 13, 2016), <https://www.hillaryclinton.com/issues/plan-raise-american-incomes> (declaring Clinton’s plans to address inequality as “working families are falling further and further behind top earners”); Margaret Talbot, *The Populist Prophet*, NEW YORKER (Oct. 12, 2015), <http://www.newyorker.com/magazine/2015/10/12/the-populist-prophet> (describing the importance of the issue of income inequality to Senator Sanders’s campaign).

221. Appelbaum, *supra* note 218 (observing that the 2016 presidential nominees tended to focus on the middle-class and largely ignored the “47 million Americans who yearn to reach the middle class”).

222. See, for example, the remarks of Andrew Puzder, CEO of CKE Restaurants and Donald Trump’s nominee for Secretary of Labor, *supra* text accompanying note 207. The above argument is similar to that raised in Section III.C.1. The analysis here directly highlights the class dimensions of the issue.

223. For a discussion of stereotypes to which poor people are subject, see Trina Jones, *Foreword, Race and Socioeconomic Class: Examining an Increasingly Complex Tapestry*, 72 L. & CONTEMP. PROBS. i, v–viii (2009).

system—that denies them access to decent benefits and the flexibility to care for themselves and their families.

*b. The intersection of race, class, and gender*

The analysis of who is deemed worthy of FWAs and other employment benefits becomes even more complicated when one considers the interplay of class, race, and gender. Race is important to the analysis because a relatively high percentage of low-wage workers are people of color.<sup>224</sup> Gender is likewise important because low-wage workers are disproportionately women.<sup>225</sup> Moreover, although men are assuming a greater share of parental responsibilities today than in the past, women still perform the bulk of this work.<sup>226</sup> Therefore, women are more likely to seek workplace accommodations and to be treated adversely when work and familial obligations conflict.<sup>227</sup>

This Article has already discussed the ways in which extending benefits to low-wage workers would promote gender equity.<sup>228</sup> The

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224. See *supra* note 61 and accompanying text.

225. See *supra* note 60 and accompanying text.

226. See Parker & Wang, *supra* note 20; ECONOMIC REPORT TO THE PRESIDENT, *supra* note 15, at 162–65.

227. It is also important to remember that men generally benefit in the workplace when their familial obligations increase (i.e., when they marry or have children). Michelle J. Budig, *The Fatherhood Bonus and the Motherhood Penalty: Parenthood and the Gender Gap in Pay*, THIRD WAY (Sept. 2, 2014), <http://www.thirdway.org/report/the-fatherhood-bonus-and-the-motherhood-penalty-parenthood-and-the-gender-gap-in-pay> (discussing the fatherhood and marriage bonuses to which men, particularly men in high-wage jobs, are subject). The picture is less clear when men request workplace accommodations for caregiving. Some evidence suggests that employers applaud men when they seek such accommodations, while other evidence suggests that employers penalize men, just like women, who seek accommodations. See Jennifer J. Berdahl & Sue H. Moon, *Workplace Mistreatment of Middle Class Workers Based on Sex, Parenthood, and Caregiving*, 69 J. SOC. ISSUES 341, 356–57 (2013) (finding that fathers engaged in active caregiving experience more harassment and mistreatment than traditional fathers, who perform relatively little caregiving at home). Professors Berdahl and Moon note that society may see men who are actively engaged in caregiving as neither good men—based on traditional notions of masculinity—nor good employees because they are not prioritizing work over home. *Id.* at 358; see also Adam B. Butler & Amie Skattebo, *What Is Acceptable for Women May Not Be for Men: The Effect of Family Conflicts with Work on Job-Performance Ratings*, 77 J. OCCUPATIONAL & ORG. PSYCHOL. 553, 559 (2004) (indicating that perceiving men as less masculine for having family conflicts may ultimately lead to lower work performance evaluations, indirectly penalizing men); Laurie A. Rudman & Kris Mescher, *Penalizing Men Who Request A Family Leave: Is Flexibility Stigma A Femininity Stigma?*, 69 J. SOC. ISSUES 322, 324–25 (2013) (predicting punishment for men who are feminized).

228. See *supra* Section III.A.3.

following subsection probes deeper to show how the intersection of race, gender, and class influence understandings of which groups are deserving of parental assistance, including family-friendly benefits provided through the workplace. In short, the analysis shows that for high-wage workers, having children is viewed very positively; but for low-wage workers, and poor Black and Latina women,<sup>229</sup> it is seen as a sign of irresponsible behavior.<sup>230</sup> Thus, society (including employers) is more likely to support the former rather than the latter.

*i. Varying constructions of working mothers*

Studies show that society does not view all existing or intending mothers equally.<sup>231</sup> For example, poor Black mothers are portrayed

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229. See *infra* text accompanying notes 232–33 for a discussion of the Black “welfare queen” trope. Professor Dorothy Roberts and others have pointed out that the disparagement of Black and Latina women also appears in their unequal access to fertility treatments, the disproportionate incarceration of women of color (many of whom are mothers), and the ready separation of Black and Latino/a children from their homes. See Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1476, 1481, 1499–1500 (2012) (explaining how state surveillance and punishment of poor women of color, who are nonviolent and frequently first-time offenders, penalizes the most marginalized women in U.S. society while blaming them for their own disadvantaged positions); Dorothy E. Roberts, *Race, Gender, and Genetic Technologies: A New Reproductive Dystopia?*, 34 SIGNS 783, 784–86, 792, 799 (2009), [http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2422&context=faculty\\_scholarship](http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2422&context=faculty_scholarship) (explaining how reproductive policies have reserved high-tech fertility practices primarily for affluent, White women, while encouraging the use of reproductive technology as population control for people of color); see also Heather E. Dillaway, *Mothers for Others: A Race, Class, and Gender Analysis of Surrogacy*, 34 INT’L J. SOC. FAM. 301, 301–02, 319–20 (2008) (analyzing the intertwined issues of gender, class, and race discrimination in surrogacy); Karni Kissil & Maureen P. Davey, *Health Disparities in Procreation: Unequal Access to Assisted Reproductive Technologies*, 24 J. FEMINIST FAM. THERAPY 197, 197, 199 (2012) (discussing the ways in which reproductive technologies have been accessible to only certain groups of women); Kristen W. Springer, *The Race and Class Privilege of Motherhood: The New York Times Presentations of Pregnant Drug-Using Women*, 25 SOC. F. 476, 476, 488, 492–93, 495 (2010), <http://www.jstor.org/stable/40783512> (arguing that media coverage of pregnant drug-using women “has little to do with protecting the health of children” but rather is more focused on defining poor and minority women as bad mothers and scapegoating these women for a range of social problems, including an overburdened foster care system and social anxiety about the meaning of family).

230. See generally DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997) (examining the way in which rhetoric and policies devalue poor Black women’s reproductive choices and perpetuate racial oppression).

231. See *supra* note 229.



as “deviant,” and they are stereotyped as Black “welfare queens.”<sup>232</sup> A typical image is of a scheming, young, unmarried, inner-city, African-American woman, who illegally claims benefits under a number of aliases while driving a welfare Cadillac, who allegedly has no qualms about producing children in order to stay on welfare, and who started childbearing as a teen and will continue to breed a criminal class or perpetuate intergenerational welfare dependency.<sup>233</sup>

Although the Black welfare queen trope has been largely directed at poor, unemployed women, similarly negative stereotypes have also influenced views of poor, working mothers.<sup>234</sup> For example, in her work on stereotypes of low-wage mothers, sociologist Lisa Dodson observes,

The language that some employers use[] to describe the deficiencies of [poor White] working mothers [is] almost indistinguishable from [the] character talk about “welfare [queens],” revealing that this stereotype ha[s] migrated, intact, into the labor market.<sup>235</sup>

Dodson found that poor working mothers were called “disorganized, unreliable, devoid of proper work ethic, and personally

232. The term originated during the Reagan era. See Josh Levin, *The Welfare Queen*, SLATE (Dec. 19, 2013, 12:41 AM), [http://www.slate.com/articles/news\\_and\\_politics/history/2013/12/linda\\_taylor\\_welfare\\_queen\\_ronald\\_reagan\\_made\\_her\\_a\\_notorious\\_american\\_villain.html](http://www.slate.com/articles/news_and_politics/history/2013/12/linda_taylor_welfare_queen_ronald_reagan_made_her_a_notorious_american_villain.html).

233. See ROBERTS, *supra* note 230, at 16–19, 110–11, 208–09 (1997); see also Natalie Augustin, *Learnfare and Black Motherhood: The Social Construction of Deviance*, in CRITICAL RACE FEMINISM 114 (Adrien Wing ed., 1997); Joel F. Handler & Danielle Sarah Seiden, *Welfare Reform and Deform*, in LAW AND CLASS IN AMERICA: TRENDS SINCE THE COLD WAR 364, 364–66 (Paul Carrington & Trina Jones eds., 2006). In addition to the Black welfare queen, there are a number of other tropes of the “deviant” Black mother in U.S. culture—including Mammy, Sapphire, and Jezebel—that have been used historically to denigrate and to justify the exploitation of Black women as mothers. See generally MELISSA V. HARRIS-PERRY, *SISTER CITIZEN: SHAME, STEREOTYPES, AND BLACK WOMEN IN AMERICA* (2011).

234. Professor Kaaryn Gustafson has shown how policies that affect “low-income mothers of all backgrounds seem to be shaped by disgust toward low-income women of color.” Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 U.C. IRVINE L. REV. 297, 346–47 (2013). One might argue that the White welfare mom is the White equivalent to the trope of the Black welfare queen. A contemporary caricature of this stereotype might be found in Mama June Shannon, the mother of Honey Boo Boo. *Here Comes Honey Boo Boo* was a television series, airing from 2012–2014, that focused on the life of a lower-class U.S. family and the child beauty pageant contestant Alana “Honey Boo Boo” Thompson. See Lori Holcomb-Holland, *TLC Says Goodbye to “Honey Boo Boo”*, N.Y. TIMES (Oct. 26, 2014), <http://www.nytimes.com/2014/10/27/arts/television/tlc-says-goodbye-to-honey-boo-boo.html>.

235. Lisa Dodson, *Stereotyping Low-Wage Mothers Who Have Work and Family Conflicts*, 69 J. SOC. ISSUES 257, 274 (2013).

irresponsible,” which she notes reflects a degree of “suspicion [about] poor women’s reproductive choices.”<sup>236</sup>

Critically, Dodson found that employers tend to blame poor working mothers for their economic vulnerability instead of a labor system that presents them with few opportunities. She notes that,

In resurrecting a familiar and demonized image, employers glossed over the ways employees’ workplace difficulties stemmed not from moral failings, but from the structure of work: from the inflexible hours and mandatory overtime, the lack of leave or sick time, and the irregular shifts. Also ignored was the impact of low wages coupled with the high cost of childcare. The structural reality of low-wage employment was quickly shunted off to the side while suspicion of poor women’s reproduction, always at the ready, took center stage. When employers made reference to the “sick kid excuse,” they seem[ed] to be referring to what they see as the poor childbearing choices of questionable women.<sup>237</sup>

Dodson’s work underscores that caricatures and stereotypes of low-income mothers and mothers of color likely influence the dismissal of their needs in the workplace. To the extent that employers view these workers as morally deficient and irresponsible, they are also likely to be viewed as undeserving of accommodations required to balance their work-family obligations.

While helpful, the above analysis may not fully illuminate why employers take the needs of other working mothers more seriously. To advance understanding of the larger picture, caricatures of Black and low-income women should be considered in relation to White, upper-class working women.

In her study of the ways in which the media constructs “myths of motherhood,”<sup>238</sup> political scientist Laurel Parker West lays an important foundation for this examination. Parker West reveals a typology of mothers, broken into four subgroups: (1) welfare mothers (“Welfare Queens”), (2) working poor mothers (“Waitress Moms”), (3) middle- to upper-class working mothers (“Super Moms”), and (4) full-time stay-at-home mothers (“Soccer Moms”).<sup>239</sup> Parker West notes that the “Soccer Mom” is readily identified as a “white, married, politically moderate to conservative, suburban, stay-

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236. *Id.*

237. *Id.*

238. Laurel Parker West, *Soccer Moms, Welfare Queens, Waitress Moms, and Super Moms: Myths of Motherhood in State Media Coverage of Child Care During the “Welfare Reforms” of the 1990s*, 25 S. CAL. INTERDISC. L.J. 313, 314 (2016).

239. *Id.* at 317.

at-home mother—‘She’s June Cleaver in a minivan.’”<sup>240</sup> Importantly, society praises the Soccer Mom for always putting her child first.

Juxtaposed against Soccer Moms are Super Moms—those women who occupy dual roles as workers and mothers.<sup>241</sup> Because society views professional ambition and effective mothering as incompatible, Super Moms are sometimes accused of being selfish and are criticized for supposedly elevating their professional aspirations over the welfare of their children.<sup>242</sup>

Among the invisible moms are Welfare Moms (discussed earlier) and Waitress Moms. According to Parker West, Waitress Moms are White, “low-income, hard-working, occasionally single, but usually married, mother[s] with little formal education and a low-paying job or jobs.”<sup>243</sup> Although Waitress Moms, like Super Moms, struggle to balance work and family responsibilities, Parker West notes that society generally does not accuse Waitress Moms of selfishness or greed.<sup>244</sup> Instead, because of

240. *Id.* at 324–25 (citations omitted). June Cleaver was a character on the television show *Leave It to Beaver* who “personified a Hollywood postwar family ideal of the ever-sweet, ever-helpful suburban stay-at-home mom.” Michael Pollak, *Barbara Billingsley, TV’s June Cleaver, Dies at 94*, N.Y. TIMES (Oct. 16, 2010), <http://www.nytimes.com/2010/10/17/arts/television/17billingsley.html>.

241. The image of the Super Mom appeared as mothers entered the workforce in increasing numbers in the 1970s and early 1980s. Parker West, *supra* note 238, at 320.

242. *Id.* at 318–20, 323–24 (describing ways in which the religious right, the media, and some researchers have vilified Super Moms). Because most mothers work, supporters of stay-at-home moms and advocates for working mothers sometimes butt heads in so-called “Mommy Wars,” with the former accusing working moms of choosing their careers over their children and the latter disparaging stay-at-home moms for failing to pursue professional fulfillment through employment. Yet, as Parker West notes, absent from this discourse is any examination of mothers who are not middle class or White. She notes,

The battle between the Super Mom and the Soccer Mom is ultimately, an elite battle between white, upper middle class mothers for whom working or not working is a “choice.” Low-income mothers, single mothers, teen mothers, minority mothers, and welfare mothers are rarely, if ever, included in the Mommy Wars, as they typically “have to work.” Their “deviant” status makes such mothers invisible in this gender role debate. Indeed, . . . “all the crocodile tears shed over the rights of children to a mother at home are largely tears saved for the middle class.”

*Id.* at 327–28 (footnotes omitted).

243. *Id.* at 328. Parker West notes that the stereotype of the Waitress Mom first appeared in the 1998 mid-term elections and also played a prominent role in the 2000 presidential election when “Al Gore profil[ed] his [] mother as a Waitress Mom working two jobs to support her family.” *Id.*

244. To some extent Parker West’s argument that Waitress Moms are positively constructed conflicts with Dodson’s description of their vilification. See *supra* text accompanying notes 235–37. Depending upon the circumstances, it is possible that

their economic marginality, Waitress Moms are viewed as having “no choice but to combine [their] mother and worker roles.”<sup>245</sup>

Parker West’s typology further supports that stereotypes about class and race likely influence the allocation of workplace accommodations and benefits, with higher-wage White working women receiving more benefits than lower-wage women and women of color. Indeed, Parker West offers one theory that may help to explain the dearth of benefits to low-income mothers like Waitress Moms and Welfare Moms. She notes that Waitress Moms are positively constructed,<sup>246</sup> but because they lack political power they “are rarely targeted for policy benefits or burdens.”<sup>247</sup> The politically powerful simply ignore Waitress Moms. On the other hand, Welfare Moms also lack political power. Yet, because they are constructed as deviants, they are more likely to elicit a policy response and “such responses are typically punitive in nature.”<sup>248</sup> Although Soccer Moms and Super Moms vary in how they are constructed, they “ultimately have the political power to successfully secure policy benefits while minimizing policy burdens.”<sup>249</sup> Extending Parker West’s analysis to the workplace, low-wage mothers are likely to be invisible or deemed unworthy of family-friendly benefits, while Super Moms are likely to be situated to advocate strongly and therefore to receive such benefits.

*ii. Family friendly for whom?*

This analysis brings into sharper focus a paradoxical aspect of family-friendly benefits. Proponents of family-friendly policies frequently argue that because parenting is socially valuable, society should better equip parents to parent well.<sup>250</sup> Indeed, because the welfare of children is at stake, some proponents maintain that there is a moral

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both researchers are correct. One suspects that society is more likely to negatively stereotype Waitress Moms when they are the sole focus of attention and when they seek workplace accommodations for themselves. However, one suspects that society is likely to praise Waitress Moms, or at least view them less negatively, when they are being compared to Super Moms and when the goal is to denigrate Super Moms.

245. Parker West, *supra* note 238, at 330.

246. *But see supra* note 244 (discussing the conflicting constructions of Waitress Moms, viewed negatively as the center of attention and positively when compared to Super Moms).

247. Parker West, *supra* note 238, at 331.

248. *Id.* at 332.

249. *Id.* at 331.

250. LAMBERT & HENLY, *supra* note 95, at 4 (finding that communities suffer when parents’ jobs perpetuate instability and unpredictability).

imperative that society does so.<sup>251</sup> In addition, proponents argue that family-friendly policies are a vital component of efforts to increase gender equity. Because most women work and women continue to bear the bulk of responsibility for childrearing, creating workplaces in which women can balance their work and family obligations is essential to the economic success of working women and their families. Yet, as this Article shows, the necessary support structures are less likely to be available to poor women who are most vulnerable in the labor market and to poor parents who most need assistance. This phenomenon raises questions about the justifications that are offered for family-friendly benefits and the efficacy of programs designed to secure their stated objectives. Does society care about all women and all children or only upper-middle class women and their children? As presently distributed, family-friendly programs appear to suggest an affirmative answer only with regard to the latter.

In summary, class bias likely fuels the benefits gap. It prevents employers and the larger society from appreciating the high degree of skill that low-wage workers bring to their jobs and the tremendous value that low-wage work brings to the U.S. economy. But, class bias does more than this. It also deflects attention from structural barriers to economic mobility and instead blames those who these impediments harm most: low-wage workers.

#### *D. Structural Limitations in Low-Wage Work*

Before discussing possible interventions, a fourth explanation for the benefits gap bears mention. Some commentators argue that structural limitations in certain low-wage jobs render the delivery of family-friendly benefits, particularly FWAs, impossible.<sup>252</sup> In short, commentators maintain that in many low-wage jobs, employees must be physically present in the workplace, often at set times, to staff their positions.<sup>253</sup> Thus, while a professor, a software engineer, or a graphics designer might feasibly telecommute or work at home for a large part of the week, this arrangement would not be possible for a cook at McDonald's, a stocker at Wal-Mart, a housekeeper at the Marriott, or an agricultural worker in California. Similarly, while

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251. *Id.*

252. See COUNCIL OF ECON. ADVISORS, *supra* note 17, at 12–13; ECONOMIC REPORT TO THE PRESIDENT, *supra* note 15, at 178–82 (discussing industry-specific job requirements).

253. *Id.* (finding that workplace flexibility is low in manufacturing, production, and construction jobs, where workers must be physically present at fixed times).

flexible daily start and stop times and compressed work weeks might be possible for an accountant, lawyer, or dentist, these options may be less practical for a teacher's assistant, a secretary, or a receptionist. The above challenges may be particularly acute in industries, like retail department stores, that experience fluctuations in consumer demand. When demand is high, employers need to increase and extend shifts; conversely, when demand is low, employers may need to reduce hours, cancel shifts, and send workers home early.<sup>254</sup>

In addition to concerns about implementing flexible time and flexible location options, some commentators argue that FWAs raise fairness concerns that require context-specific consideration and mediation. If Employee X is not present in the workplace due to a compressed work week or flexible hours, then often someone else must be. In other words, accommodating Employee X may sometimes require imposing on Employee Y, if Employee Y would prefer not to be present (or to take on additional responsibilities) because X is absent.

While the above issues are not insignificant, FWAs, particularly flexible time options, should not be ruled out across the board because of structural impediments that may exist in some industries. Indeed, some observers have noted that the aforementioned organizational and administrative difficulties are overstated,<sup>255</sup> particularly when one considers the number of workers with whom employers are dealing. In other words, because there are generally more low-wage workers per workplace, employers have a greater supply of workers to call upon to fill gaps in coverage. To be sure, if a larger number of workers were to seek FWAs, then the administrative demands might be higher. But existing data show that when workplace flexibility is available, workers have not abused these options, and indeed, their existence has caused few administrative hassles.<sup>256</sup> The fact that those industries with fluctuating consumer demand can adjust the hours and schedules of their low-wage workers in response to such demand shows that modifications are possible when the will exists.

Fairness concerns also should not be overblown. Some FWAs require relatively minor adjustments and infringements. For example, allowing a server at Denny's to adjust her break time so she can call a

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254. LAMBERT & HENLY, *supra* note 95, at 5. The lack of schedule stability for retail workers is a kind of workplace flexibility, but it is a flexibility designed to meet the needs of management rather than employees. Retail employers need a large pool of workers to accommodate changes in consumer demand, but these workers do not see full-time, steady work.

255. See *supra* text accompanying notes 156–66.

256. See *supra* text accompanying notes 156–60.

doctor or a teacher might require an adjustment to another server's schedule as well, but the infringement seems relatively minor. And, allowing a periodic, voluntary schedule swap among employees performing the same job, for instance sales clerks at Macy's, involves even less infringement on other workers. To be sure, such adjustments are not as easy to manage as a rule mandating that all employees comply with set, inflexible workplace requirements. Yet, it bears remembering that small adjustments can make huge differences in the lives of employees, creating good will toward the employer, fewer outside distractions, and consequent increases in productivity.<sup>257</sup>

Finally, even if structural differences were to explain, in part, the reluctance of employers to offer low-wage workers FWAs, they do not explain their failure to offer other benefits like paid family leave, short-term disability leave, health insurance, or retirement benefits. Health insurance and retirement benefits require no time away from the workplace. While family and disability leaves do, so far data from states that have implemented paid leave policies show that employees have not abused the programs, and their existence has not caused undue disruptions in the workplace.<sup>258</sup>

Convincing employers to be more open to the possibility of greater benefits for low-wage employees will not be easy, particularly given class bias against these workers and the fact that many employers will see few economic reasons to act. Such change will require a cultural shift in the way in which employers view low-wage workers and the value of low-wage work. It will also require that employers understand that low-wage workers are not a monolithic group. While there may be an excess supply of such workers given the number of available jobs, employers should still aspire to avoid high turnover costs and to recruit and retain the most reliable, most hardworking, and most engaged individuals among the pool of low-wage workers.<sup>259</sup>

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257. See *supra* Sections III.A.1–2 for discussion of the benefits of FWAs for employers and employees.

258. See *supra* text accompanying notes 162–66.

259. Employers like McDonald's and Wal-Mart are plagued by high turnover and low productivity rates. See Annie Lowrey, *Supersize My Wage: It's the Economy*, N.Y. TIMES MAG. (Dec. 17, 2013), <http://www.nytimes.com/2013/12/22/magazine/super-size-my-wage.html> ("The types of jobs available to workers at the minimum wage—meatpacking, box-stuffing, burger-flipping—tend to be hard, unpleasant, dull work. Employees rarely stick around for long, and their productivity is typically low. 'Companies like Walmart can have turnover rates of [100%] a year.'" (quoting economics professor Michael Reich)). One expects that increased benefits and greater workplace flexibility would make low-wage jobs more attractive to workers who would then be more likely to remain in their jobs longer.

In other words, within the supply of low-wage workers, competition still exists. The extension of family-friendly benefits can thus pay real dividends not only for workers but for employers.

#### IV. A BLEAK FUTURE FORECAST

Thus far, this Article has highlighted the woefully inadequate benefits available to low-wage workers. It has also demonstrated that employers may be loath to do anything about this state of affairs due to costs, the law of supply and demand, and various forms of bias. As this Part demonstrates, the benefits crisis is aggravated by the decline of organized labor and limited legislative action.

##### A. *The Decline of Organized Labor*

Since at least 1935 and the passage of the National Labor Relations Act,<sup>260</sup> unions have played a significant role in advancing employment terms and conditions for millions of workers.<sup>261</sup> In the 1950s and 1960s, unions helped to elevate autoworkers, steelworkers, machinists, truck drivers, carpenters, and some apparel workers into the middle class.<sup>262</sup> In recent years, unions like the Service Employees International Union (SEIU) have advocated successfully for the rights of janitors, hotel housekeepers, home-care aides, and

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260. Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2012)).

261. See Craig Becker, *The Pattern of Union Decline, Economic and Political Consequences, and the Puzzle of a Legislative Response*, 98 MINN. L. REV. 1637, 1639–40 (2014) (noting that from the rise of unions until union membership began to decline, wages and productivity in the United States were closely linked); Jonathan Fox Harris, Comment, *Worker Unity and the Law: A Comparative Analysis of the National Labor Relations Act and the Fair Labor Standards Act, and the Hope for the NLRA's Future*, 13 N.Y.C. L. REV. 107, 110–14 (2009) (describing the impetus behind passage of the NLRB as a desire to alter the balance of power in favor of workers over management); Chris Tilly, *Trade Unions, Inequality, and Democracy in the US and Mexico*, 2 RETHINKING DEV. & INEQ. (SPECIAL ISSUE) 68, 69–77 (2013), [http://www.irle.ucla.edu/publications/documents/Tilly-Unions-inequality-democracy-inUS\\_MX-13-45-1-PB-RethinkingInequality\\_Devel-2013.pdf](http://www.irle.ucla.edu/publications/documents/Tilly-Unions-inequality-democracy-inUS_MX-13-45-1-PB-RethinkingInequality_Devel-2013.pdf) (reviewing the history of unions and inequality in the United States and Mexico, and acknowledging the potential of recent waves of unions to “once more become a powerful equalizing and democratizing force”).

262. See, e.g., Becker, *supra* note 261, at 1638–40 (discussing the historic role of unions in the growth of the middle class); Steven Greenhouse, *How to Get Low-Wage Workers into the Middle Class*, ATLANTIC (Aug. 19, 2015), <http://www.theatlantic.com/business/archive/2015/08/fifteen-dollars-minimum-wage/401540> (same).



other low-wage workers.<sup>263</sup> As a result, in major U.S. cities today, unionized workers receive higher earnings and better benefits than their non-unionized counterparts.<sup>264</sup> This applies across demographic groups, as data show a substantial increase in wages<sup>265</sup> and benefits<sup>266</sup> for union workers in general, and a particularly large increase for low-wage workers.<sup>267</sup>

Despite the strong connection between unions and economic mobility, over the past five decades unions have been under sustained attack in the United States,<sup>268</sup> and the number of unions and union members has steadily decreased. In 1950, about 33% of U.S. workers

263. Notably, in the Fight for \$15, SEIU has convinced major cities like Los Angeles, Seattle, San Francisco, and New York to incrementally increase the wages of food service workers to \$15 an hour. Bruce Kennedy, *Fast-Food Workers Plan to Strike in 190 U.S. Cities*, CBS MONEYWATCH (Dec. 3, 2014, 8:00 AM), <http://www.cbsnews.com/news/food-fight-work-stoppages-planned-at-many-fast-food-restaurants> (noting that “Seattle and San Francisco passed laws raising wages to \$15 over the next couple years, and cities from New York to Los Angeles are pushing for higher wages too”). SEIU has persuaded Chicago and Kansas City to adopt a \$13 wage and has obtained more modest increases in Alaska, Arkansas, Nebraska, and other states and localities. Greenhouse, *supra* note 262. Importantly, while SEIU has spent more than \$30 million and secured greater benefits for more than 8 million U.S. workers, SEIU has only 1.8 million members. *Id.*

264. See ECON. POLICY INST., FACT SHEET, COLLECTIVE BARGAINING’S EROSION HAS UNDERCUT WAGE GROWTH AND FUELED INEQUALITY (Mar. 17, 2015), [http://www.epi.org/files/2015/factsheet\\_80229.pdf](http://www.epi.org/files/2015/factsheet_80229.pdf).

265. *Id.* at 1 (noting the union wage premium to be 13.6%).

266. *Id.* at 2 (“Unionized workers are [28.2%] more likely to be covered by employer-provided health insurance and [53.9%] more likely to have employer-provided pensions, and also enjoy more paid time off with their families.”).

267. See JOHN SCHMITT, CTR. FOR ECON. & POLICY RESEARCH, THE UNION WAGE ADVANTAGE FOR LOW-WAGE WORKERS 2 (2008), [http://cepr.net/documents/publications/quantile\\_2008\\_05.pdf](http://cepr.net/documents/publications/quantile_2008_05.pdf) (showing that unionization increases wages for low-wage workers by about 20.6%); HEIDI SHERHOLZ, ECON. POLICY INST., LOW WAGES AND FEW BENEFITS MEAN MANY RESTAURANT WORKERS CAN’T MAKE ENDS MEET 4 (2014), <http://www.epi.org/publication/restaurant-workers> (highlighting how workers in the restaurant industry receive few benefits but unionized restaurant workers are better off than the average worker).

268. See HAROLD MEYERSON, THE STATE OF THE AMERICAN UNIONS 3–4 (2012), <http://library.fes.de/pdf-files/id-moe/08922-20120302.pdf> (describing forces that, over the past three decades, have led to the decline of unions in the United States). Hostility to unions has ramped up in recent years. For example, in 2011, Wisconsin Governor Scott Walker signed a law that denies public-sector employees (with the exception of police officers and fire fighters) the right to collective bargaining. *Id.* at 5–6; see also Dan Kaufman, *Scott Walker and the Fate of the Union*, N.Y. TIMES MAG. (June 12, 2015), <http://www.nytimes.com/2015/06/14/magazine/scott-walker-and-the-fate-of-the-union.html> (outlining the evolution of anti-union legislation and the actions of Governor Scott Walker to remove unionization from Wisconsin).

belonged to unions;<sup>269</sup> in 2015, that number had shrunk to about 11% overall (with only about 6.7% in the private sector and 35.2% in the public-sector).<sup>270</sup> Union membership has dropped despite the fact that “more workers want collective bargaining than are able to benefit from it—and . . . the desire for collective bargaining has increased greatly since the 1980s.”<sup>271</sup>

Several factors have contributed to this decline. Employer opposition has intensified,<sup>272</sup> and a proliferation of anti-labor laws has, among other things, eliminated collective bargaining rights for public employees and imposed right-to-work restrictions.<sup>273</sup> In addition, the structure of the U.S. workforce has changed, with more workers occupying nontraditional jobs, including temps, freelancers, part-time workers, independent contractors, on-call workers, and employees in franchises.<sup>274</sup> These structural changes make it more

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269. Ben Bergman, *Unions Have Pushed the \$15 Minimum Wage, but Few Members Will Benefit*, NPR (Feb. 10, 2015), <http://www.npr.org/2015/02/10/384980527/unions-have-pushed-the-15-minimum-wage-but-few-members-will-benefit>.

270. Press Release, U.S. Dep’t of Labor, Bureau of Labor Statistics, Union Members Summary (Jan. 28, 2016), <https://www.bls.gov/news.release/union2.nr0.htm>.

271. ECON. POLICY INST., *supra* note 264, at 1; *see also* RICHARD B. FREEMAN, ECON. POLICY INST., *DO WORKERS STILL WANT UNIONS? MORE THAN EVER 2* (2007) (finding that “a majority of nonunion workers in 2005 would vote for union representation if they could,” compared with only about 30% of such workers in 1980). Approval ratings for labor unions are also on the rise. *See* Lydia Saad, *Americans’ Support for Labor Unions Continues to Recover*, GALLUP (Aug. 17, 2015), <http://www.gallup.com/poll/184622/americans-support-labor-unions-continues-recover.aspx> (chronicling approval rates over time and indicating that approval rates jumped five points in 2015, from 53% to 58%).

272. *See* Keith J. Gross, *Separate to Unite: Will Change to Win Strengthen Organized Labor in America?*, 24 BUFF. PUB. INT. L.J. 75, 122–23 (2006) (describing aggressive union-busting activities of employers and noting that in cases “where employees do seek union representation and file an election petition . . . , employers manage to avoid unionization more than 50 percent of the time”); ECON. POLICY INST., *supra* note 264, at 1 (noting a greater employer focus today on “more coercive and punitive tactics designed to intensely monitor and punish union activity” than in the 1990s).

273. *See* Kaufman, *supra* note 268 (outlining the evolution of anti-union legislation). Right-to-work laws prevent employers and unions from requiring union membership, or the payment of union dues, as a condition of employment. *Right-to-Work Resources*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx> (last visited Feb. 5, 2017); Dave Jamieson, *How Right-to-Work Laws Hurt Unions*, HUFFINGTON POST (Feb. 23, 2015, 2:34 PM), [http://www.huffingtonpost.com/2015/02/23/right-to-work-laws\\_n\\_6737130.html](http://www.huffingtonpost.com/2015/02/23/right-to-work-laws_n_6737130.html).

274. Greenhouse, *supra* note 262. Some have suggested that employers are using nontraditional labor not only to cut labor costs and secure greater efficiencies but also to decrease the ability of workers to advocate for their rights. MEYERSON, *supra* note 268, at 4–6.

difficult to organize workers because workers are dispersed and do not stay in one workplace for long periods of time. Moreover, many low-wage workers, whose economic status is already perilous, are frightened of losing their jobs and are reluctant to join any entity that their employers might view as threatening.<sup>275</sup>

Unfortunately, the National Labor Relations Act has been ineffective at countering these challenges because the Act excludes many workers in nontraditional positions from coverage.<sup>276</sup> In addition, the Act incorporates a firm-centered bargaining structure, which is ill-suited to address dispersed labor and the effects of globalization on U.S. workers.<sup>277</sup> With the sustained attack on unions, the vulnerabilities of low-wage workers, and the decline in unionization, it is thus hard to imagine unions as a force for change

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275. This is particularly true of undocumented workers, who are disproportionately located in low-wage work. See RANDY CAPPs ET AL., URBAN INST., A PROFILE OF THE LOW-WAGE IMMIGRANT WORKFORCE 1 (2003), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/310880-A-Profile-of-the-Low-Wage-Immigrant-Workforce.PDF> (finding that “[i]mmigrants are [11%] of all U.S. residents, but [14%] of all workers and [20%] of low-wage workers”).

276. See 29 U.S.C. § 152(3) (2012); see also *Are You Covered?*, NAT’L LAB. REL. BOARD, <https://www.nlrb.gov/rights-we-protect/whats-law/employees/i-am-represented-union/are-you-covered> (last visited Feb. 5, 2017) (noting that agricultural and domestic workers, independent contractors, supervisors, and some public-sector employees are excluded from coverage under the NLRA). Some commentators have advocated for abolishing these exclusions. See, e.g., Joel Rogers, *Reforming U.S. Labor Relations*, 69 CHI.-KENT L. REV. 97, 112 (1993) (suggesting such a change).

277. Reforms have been suggested to address the changing structure of the American labor force. For example, it has been suggested that the National Labor Relations Board be encouraged to declare large employers, such as McDonald’s, “joint employers,” which would render mega-corporations “jointly liable in cases where franchisees illegally fire workers for backing a union.” Greenhouse, *supra* note 262; see 29 C.F.R. § 825.106 (2016) (providing that when two or more businesses exercise some control over the working conditions of an employee, all of the businesses may be subject to certain labor and employment statutes); BTI Newby Island Recyclery, 362 N.L.R.B. 186 (2015) (clarifying the joint employer standard under the NLRB)). In addition, unions might seek to adopt the European Union’s approach to collective bargaining, in which unions bargain on a regional or sectoral basis. See Rogers, *supra* note 276, at 115–17. For a similar suggestion regarding nationwide bargaining, see also Greenhouse, *supra* note 262. This approach would permit unions representing employees in different firms in the same industry to bargain with multiple employers. Such efforts would allow unions to leverage their bargaining power and “facilitate greater wage coordination among . . . employees of large firms.” Rogers, *supra*, at 116. Professor Rogers notes that the more significant effect of regional or sectoral bargaining would be “to extend the benefits of wage generalization to employees in smaller locations—too small, under present circumstances, to support the costs of the negotiation and enforcement of separate contracts—or operating in more casualized or ‘independent’ employment relations.” *Id.*

in the near future. As David Rolf, the Vice President of SEIU, has noted, “[A]ny model that shrinks for 50 years in a row in all 50 states is probably not part of the future.”<sup>278</sup>

With the decline of unions, labor advocacy groups, like Restaurant Opportunities Centers United (ROC)<sup>279</sup> and National Domestic Workers Alliance (NDWA),<sup>280</sup> have emerged. These groups, which are also referred to as “alt-labor,” “new actors,” or “worker centers,” conduct research, provide general information to workers, advocate for workers when their rights have been violated, and wage campaigns for pro-labor legislation. For example, ROC has launched a major campaign, with some success, to secure legislation that would require restaurant owners to pay tipped employees at least the regular minimum wage (the federal tipped minimum wage is \$2.13 an hour).<sup>281</sup> Similarly, NDWA has worked to raise awareness and to improve working conditions for domestic workers (i.e., nannies, house cleaners, and care workers),<sup>282</sup> who are excluded from coverage under the NLRA.<sup>283</sup>

While alt-labor has offered new ways to advocate for workers, commentators have questioned the long-term impact of these groups, when compared to unions, due to (1) their funding models and (2) their limited ability to enforce worker rights.<sup>284</sup> Unlike unions, which

278. Bergman, *supra* note 269.

279. ROC was established in New York City in the aftermath of September 11, 2001, to assist restaurant workers who were displaced after the attack on the World Trade Center. It has grown into a national organization with 18,000 low-wage worker members in 15 states. *About Us*, REST. OPPORTUNITIES CTRS. UNITED, <http://rocunited.org/about-us> (last visited Feb. 5, 2017).

280. NDWA consists of more than 20,000 nannies, housekeepers, and caregivers for the elderly. *Who We Are*, NAT'L DOMESTIC WORKERS ALLIANCE, <http://www.domesticworkers.org/who-we-are> (last visited Feb. 5, 2017).

281. The ROC website states that, among other things, it has won more than \$10 million in misappropriated tips and wages and discrimination payments for low-wage workers . . . , [has] partner[ed] with almost 200 responsible restaurant owners to promote the ‘high road’ to profitability, has trained more than 5,000 restaurant workers to advance to livable-wage jobs within the industry, and has published over 30 ground-breaking reports and a nationally bestselling book on the restaurant industry.

REST. OPPORTUNITIES CTRS. UNITED, *supra* note 279.

282. *Who We Are*, *supra* note 280.

283. See *supra* note 276 and accompanying text.

284. See Marion Crain & John Inazu, *Re-Assembling Labor*, 2015 U. ILL. L. REV. 1791, 1843–44; Marion Crain & Ken Matheny, *Beyond Unions, Notwithstanding Labor Law*, 4 U.C. IRVINE L. REV. 561, 579–80 (2014); Michael Oswalt, *Improvisational Unionism*, 104 CAL. L. REV. 597, 603–06, 611 (2016) (defending improvisational unionism while acknowledging that the future end game is unclear).

are self-financed through membership dues, alt-labor organizations often rely upon small, foundation-funded budgets.<sup>285</sup> These budgetary restrictions limit the scope of alt-labor's work.<sup>286</sup> Second, while alt-labor groups are good at drawing attention to problems and securing policy changes, unlike unions, they lack power and resources to collectively bargain for specific employees or to handle individual employee grievances.<sup>287</sup> Third, because alt-labor groups advocate for unaffiliated workers, their ability to mobilize these workers may be restricted.<sup>288</sup> In short, it appears that alt-labor lacks the financial resources, infrastructure, political connections, and mobilization capabilities that have historically made unions powerful.<sup>289</sup>

To be sure, promising collaborations have emerged in recent years between alt-labor, community organizations, and unions. The most notable such collaboration is the Fight for \$15, which has led several states and numerous cities to raise their minimum wage on an incremental basis to \$15 an hour.<sup>290</sup> This partnership between SEIU and alt-labor has possibly given rise to a new paradigm for worker rights.<sup>291</sup> But even the most ardent proponents of this "new labor

285. See Josh Eidelson, *Who Should Fund Alt-Labor?*, NATION (July 17, 2013), <https://www.thenation.com/article/who-should-fund-alt-labor> (outlining the funding options used by many alt-labor organizations); see also Michael C. Duff, *ALT-Labor, Secondary Boycotts, and Toward a Labor Organization Bargain*, 63 CATH. U. L. REV. 837, 851 (2014) (referencing funding mechanisms).

286. Kati L. Griffith, Essay, *Worker Centers and Labor Law Protections: Why Aren't They Having Their Cake?*, 36 BERKELEY J. EMP. & LAB. L. 331, 346–47 (2015) (providing that limited finances restrict alt-labor from providing specialized resources to workers).

287. Jonathan Timm, *A Labor Movement That's More About Women*, ATLANTIC (Aug. 25, 2016), <http://www.theatlantic.com/business/archive/2016/08/the-womens-labor-movement/497294> (explaining that absent institutional structures that workers can call upon to protect their immediate rights, employers will continue to violate labor laws because of low penalties and the inability of the government to monitor every firm).

288. See Greenhouse, *supra* note 262 (noting that groups advocating for unaffiliated workers will likely lack the resources, gravitas, or organizing structures to influence outcomes as effectively as unions).

289. See *id.* (describing the challenges faced by groups such as the Coalition of Immokalee Workers and Domestic Workers United); see also Becker, *supra* note 261, at 1641–43 (arguing that unions are necessary to counter the large influence of corporations on the U.S. political process).

290. See *supra* note 263.

291. See, e.g., Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 7–11 (2016). Professor Andrias argues that "the new labor law would combine social bargaining—i.e., bargaining that occurs in the public arena on a sectoral and regional basis—with both old and new forms of worksite representation." *Id.* at 8. She notes that "[i]t is a more inclusive and political model of labor relations, with parallels to regimes in Europe and elsewhere." *Id.* at 8–9.

law” express uncertainty about its potential to protect workers in a changing and increasingly global economy.<sup>292</sup> For lasting change, what is needed is a transformation and rebirth of unions and of labor law, which many predict is unlikely to happen in the near future. The outlook for unions is bleaker following the election in November 2016 of a Republican President, a Republican-dominated Congress, and a soon to be conservative-dominated Supreme Court.<sup>293</sup>

*B. Legislative Action and Inaction*

Governmental action to address the benefits gap has been limited. With the decline of unions, workers have experienced less protection in the workplace and less influence among state and federal legislatures. Indeed, the void left by organized labor has been filled by powerful corporate lobbyists and others, who have argued forcefully against governmental intervention. For example, Carly Fiorina, a former Republican candidate for the Presidency and a former CEO of Hewlett-Packard,<sup>294</sup> stated in 2015, in response to calls for paid maternity leave: “I don’t think it’s the role of government to dictate to the private sector how to manage their businesses, especially when it’s

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292. See *id.* at 8. Andrias is skeptical of the potential of the law that she sees emerging, noting that “chances of success are uncertain at best, and the specifics of what success would look like are far from clear.” *Id.* She observes,

I recognize the nascent regime’s limitations, including the inherent short comings of a domestic labor regime in an increasingly global economy and the challenge of maintaining worker voice and union funding in a system not based primarily on traditional exclusive bargaining agreements. Moreover, in a political environment hostile to reform, the new labor law is by no means certain, nor is it the only possible path forward.

*Id.* at 11–12 (footnotes omitted).

293. See Harold Myerson, *Donald Trump Can Kill the American Union*, WASH. POST (Nov. 23, 2016), <https://www.washingtonpost.com/posteverything/wp/2016/11/23/donald-trump-could-kill-the-american-union> (noting that “within the GOP, the war on unions engenders almost no dissent,” and describing the likely pernicious effects of a Republican Executive, Congress, and Supreme Court); see also Ted Hesson, *Trump Launches War on Unions*, POLITICO (Dec. 8, 2016, 5:56 PM), <http://www.politico.com/story/2016/12/trump-unions-war-232382> (discussing the selection of Andrew Puzder, anti-union advocate and critic of raising the minimum wage, to head the Department of Labor); Kris Maher, *Donald Trump’s Carrier Intervention Has Labor Leaders Wary*, WALL ST. J. (Dec. 10, 2016, 6:00 PM), <http://www.wsj.com/articles/donald-trumps-carrier-intervention-has-labor-leaders-wary-1481400984> (describing Trump’s already bumpy start with organized labor).

294. See Ashley Parker, *Carly Fiorina Drops out of Republican Presidential Race*, N.Y. TIMES (Feb. 10, 2016), <http://www.nytimes.com/2016/02/11/us/politics/carly-fiorina-quits.html> (providing career details on Carly Fiorina).

pretty clear that the private sector . . . is doing the right thing because they know it helps them attract the right talent.”<sup>295</sup>

Ms. Fiorina’s statement is wrong: the private sector has failed to solve the problem of a lack of paid leave in the United States.<sup>296</sup> In 2012, only 11% of private sector workers in the United States had paid family leave,<sup>297</sup> and only 61% of private sector workers had paid sick leave.<sup>298</sup> As the data set forth in Part II show, the numbers for low-wage workers are even worse.<sup>299</sup> Moreover, the absence of governmental regulation has left a lot of discretion with employers, rendering the provision of benefits both tenuous and inconsistent across workplaces. As one commentator has observed, what Netflix gives, Netflix can take away<sup>300</sup>—and, one might add, Netflix can dole out in a highly-selective fashion (as, in fact, it has done).<sup>301</sup>

A federal statute mandating *paid* family leave and *paid* sick leave would make it much more feasible for all workers, not just those who are well off, to attend to themselves and to their families. Importantly, models for such legislation exist. For example, Hillary Clinton, the 2016 Democratic Presidential nominee, set forth a proposal that would

295. Bryce Covert, *Carly Fiorina Thinks Corporations Should Be Able to Deny Paid Leave to New Mothers*, THINKPROGRESS (Aug. 10, 2015), <http://thinkprogress.org/economy/2015/08/10/3689780/fiorina-paid-family-leave>.

296. Government employees tend to fare better in terms of paid leave than workers in the private sector. For instance, federal government employees are entitled to up to six weeks of paid parental leave after the birth of a child. Andy Medici, *Obama Gives Federal Employees Paid Family Leave*, FED. TIMES (Jan. 15, 2015), <http://www.federaltimes.com/story/government/management/compensation/2015/01/15/paid-family-leave/21802251>. In 2015, President Obama also signed Executive Order 13706, which requires that federal contractors provide their employees with up to seven days of annual paid sick leave. See *Paid Sick Leave for Workers on Federal Contracts*, U.S. DEP’T OF LAB., <https://www.dol.gov/whd/flsa/eo13706/faq.htm> (last visited Feb. 5, 2017); see also Press Release, The White House, Executive Order—Establishing Paid Sick Leave for Federal Contractors (Sept. 7, 2015), <https://www.whitehouse.gov/the-press-office/2015/09/08/executive-order-establishing-paid-sick-leave-federal-contractors>.

297. Robert W. Van Giezen, *Paid Leave in Private Industry over the Past 20 Years*, BUREAU OF LAB. STAT.: BEYOND THE NUMBERS, Aug. 2013, at 1, 2, <https://www.bls.gov/opub/btn/volume-2/pdf/paid-leave-in-private-industry-over-the-past-20-years.pdf>.

298. *Id.*

299. See *supra* notes 99–110 and accompanying text; see also Emily Crockett, *New York Just Passed the Most Generous Paid Family Leave Law in the Country*, VOX (Apr. 1, 2016, 4:40 PM), <http://www.vox.com/2016/4/1/11347192/new-york-paid-family-leave-yuge> (noting that 5% of employees in the lowest-paid 25% of the workforce have paid leave, while 22% of the highest 10% of earners do).

300. Peck, *supra* note 8 (“[P]aid leave is a perk that’s mostly left to companies to dole out at their discretion.”).

301. See *supra* note 11 and accompanying text.

in effect extend the FMLA to provide for paid leave.<sup>302</sup> Senate Democrats, led by Senator Kirsten Gillibrand, have also proposed legislation, the FAMILY Act (the Family and Medical Insurance Leave Act),<sup>303</sup> which would provide eligible employees with up to twelve weeks of paid family leave, with two-third's wage replacement (capped at \$4000).<sup>304</sup> This legislation, however, has not been put to a vote in Congress, nor is it likely to be as long as Republicans continue to control both legislative chambers.<sup>305</sup> To be sure, during the final months of his campaign, Donald Trump put forth a child-care policy that included six weeks of paid maternity leave for working women whose employers did not offer such leave.<sup>306</sup> Commentators, however,

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302. See *Paid Family and Medical Leave*, HILLARY FOR AMERICA, <https://www.hillaryclinton.com/issues/paid-leave> (last visited Jan. 25, 2017) (noting that Clinton proposed to pay for her plan by raising taxes on wealthy Americans and corporations). A soon-to-be released proposal from the American Action Forum (AAF), a conservative research group, would target low-income workers. The AAF proposal would provide up to \$3500 over twelve weeks for workers with an annual income of less than \$28,000. See Russell Berman, *A Conservative Push for Paid Family Leave*, ATLANTIC (Aug. 15, 2016), <http://www.theatlantic.com/politics/archive/2016/08/a-new-conservative-entitlement-for-paid-family-leave/495686>.

303. S. 786, 114th Cong. (as introduced to Senate Mar. 18, 2015); *The American Opportunity Agenda: Expand Paid Family and Medical Leave*, OFF. SENATOR KIRSTEN GILLIBRAND, <http://www.gillibrand.senate.gov/issues/paid-family-medical-leave> (last visited Feb. 5, 2017) [hereinafter *Expand Paid Leave*] (summarizing the legislation).

304. EXPAND PAID LEAVE, *supra* note 303. The FAMILY Act is more expansive than the FMLA as it would cover all workers, regardless of their age, marital status, gender, or full-time or part-time employment status. *Id.* It also would cover all employers, regardless of their size. *Id.* The Act would be funded through “employee and employer contributions of two-tenths of one percent of a worker’s wages—about \$2.00 per week for a typical worker.” *Id.* Importantly, neither the Clinton proposal nor the FAMILY Act provide for accrued sick leave.

305. Republicans have historically opposed efforts to expand governmental support for social welfare programs. Sean Sullivan & Robert Costa, *Donald Trump Unveils Child-Care Policy Influenced by Ivanka Trump*, WASH. POST (Sept. 13, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/09/13/donald-trump-joined-by-ivanka-trump-to-outline-child-care-policy> (observing that “Conservative Republicans . . . have long seen a mandated expansion of the social safety net as anathema to their attempts to shrink government spending and give companies more control over their leave policies”).

306. DONALD J. TRUMP FOR PRESIDENT, CHILD CARE REFORMS THAT WILL MAKE AMERICA GREAT AGAIN 4–5, [https://assets.donaldjtrump.com/Childcare\\_Reform.pdf](https://assets.donaldjtrump.com/Childcare_Reform.pdf) (last visited Feb. 5, 2017). The proposed Trump plan would also offer an income tax deduction for childcare costs, create a dependent care savings account (funded with pre-tax income) for childcare expenses, and offer a tax credit to incentivize employers to provide childcare at work. *Id.* at 1–4. Mr. Trump stated that he would fund the plan with savings gained from eliminating fraud in the unemployment insurance program. *Id.* at 5.



have criticized the Trump plan because it does not extend to fathers.<sup>307</sup> This omission may negatively affect women's labor force participation rates and aggravate the gender pay gap.<sup>308</sup> In addition, considerable doubt exists about whether Mr. Trump will be able to get his proposal through Congress, should he decide to proceed with it, given traditional Republican hostility to social welfare legislation.<sup>309</sup>

Thus, at the federal level, the main statute granting workplace benefits continues to be the 1993 Family and Medical Leave Act. As noted earlier, because the FMLA mandates only unpaid leave, its benefits are of limited use to workers who cannot afford a loss in wages.<sup>310</sup> Moreover, when compared to what other developed nations provide, the FMLA is woefully inadequate.<sup>311</sup>

At the state level, there has been more action. In recent years, four states (New York, California, Rhode Island, and New Jersey) have enacted paid family leave,<sup>312</sup> and five states (California, Connecticut, Massachusetts, Oregon, and Vermont) have enacted paid sick leave.<sup>313</sup> For example, New York's paid family leave law, which was passed in April

307. See, e.g., Lisa Petrillo, *President-Elect Trump's Paid Parental Leave Is Only for Mothers After Childbirth*, SOC'Y FOR HUM. RESOURCE MGMT. (Nov. 10, 2016), <https://www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/trump-paid-parental-leave.aspx>.

308. See Sullivan & Costa, *supra* note 305 (quoting a Clinton senior advisor who noted that "by focusing solely on leave policies that benefit women, Trump may actually be hurting their cause, contributing to the attrition of women from the workplace after childbirth and the gender pay gap").

309. See *supra* note 305; Allen Smith, *Trump's Maternity Leave Proposal May Not Be Popular on Capitol Hill*, SOC'Y FOR HUM. RESOURCES MGMT. (Nov. 16, 2016), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/trump-maternity-leave-proposal.aspx>.

310. See *supra* notes 109–10 and accompanying text. In addition, many low-wage workers may not be eligible for FMLA leave. As noted in Section II.B, the FMLA only applies to employers with fifty or more employees and to workers who have logged at least 1250 hours with their employer in the twelve months before requesting leave.

311. See ECONOMIC REPORT TO THE PRESIDENT, *supra* note 15, at 170 (observing that while the "expanded leave opportunities provided by the FMLA made real progress for American workers two decades ago, the United States today significantly lags its international peers in leave provision").

312. See *State Family and Medical Leave Laws*, NAT'L CONF. OF ST. LEGISLATURES (July 19, 2016), <http://www.ncsl.org/research/labor-and-employment/state-family-and-medical-leave-laws.aspx> (providing a synopsis of each state's family and medical leave laws); *Paid Family Leave*, NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/research/labor-and-employment/paid-family-leave-resources.aspx> (last visited Feb. 5, 2017) (providing links to each state's law).

313. See *Paid Sick Leave*, NAT'L CONF. OF ST. LEGISLATURES (July 6, 2016), <http://www.ncsl.org/research/labor-and-employment/paid-sick-leave.aspx> (providing links to each state's law).

2016, provides all employees with three months of partially paid time off to care for a new child or a seriously ill family member.<sup>314</sup> Connecticut, which was the first state to adopt paid sick leave for private employers in 2012, allows employees to accrue paid sick leave at a rate of one hour of leave for each forty hours worked, up to a maximum of forty hours per calendar year.<sup>315</sup> Although details vary, the laws in other states are substantially similar to New York's and Connecticut's.<sup>316</sup>

Importantly, in adopting these paid leave laws, legislators have been sensitive to concerns about employer costs and have sought to minimize financial burdens on employers by funding the programs

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314. See Crockett, *supra* note 299. New York's law, which has been characterized as the most comprehensive in the United States, will be phased in gradually, with eight weeks at 50% pay in 2018 and expanding to twelve weeks at 67% pay in 2021. *Id.*; *State and Family Medical Leave Laws*, *supra* note 312. Although twelve weeks of paid leave appears generous when compared to none, it is very little when compared to other developed countries. See Crockett, *supra* note 299 (comparing New York's law to the 35 weeks offered in Canada, the 44 weeks in Germany, and the 70 weeks in Norway, and observing that "[e]ven Saudi Arabia offers 10 weeks of paid maternity leave, which is a lot more than the zero weeks Americans get unless they work for a generous employer").

California's paid family leave program "provide[s] up to six weeks of wage replacement benefits to workers who take time off work to care for a seriously ill child, [or other family member,] or to bond with a minor child" following birth, adoption, or foster care placement. CAL. UNEMP. INS. CODE §§ 3301–3303 (West 2013). New Jersey and Rhode Island's plans are similar, with New Jersey offering six weeks of paid family leave, and Rhode Island offering four. N.J. STAT. ANN. § 43:21-39 (West 2016); R.I. GEN. LAWS § 28-41-35(d)(1) (2015). Under their respective disability benefits laws, these states also provide similar or longer coverage, at partial pay, for employees needing time off to care for their own serious illnesses. For example, California's Paid Family Leave Law does not cover leave to care for the worker as California state disability insurance benefits "provide wage replacement for workers who need time off due to their own non-work-related injuries, illnesses, or conditions, including pregnancy, that prevent them from working." CAL. UNEMP. INS. CODE § 3300(e).

315. CONN. GEN. STAT. § 31-57s (2015). California, which enacted its paid sick leave statute in 2014, allows one hour for every thirty hours worked, up to a maximum of forty-eight hours or six days. CAL. LAB. CODE § 246(b). Oregon and Massachusetts similarly provide for one hour of paid leave for every thirty hours, but unlike California, these states allow for up to forty hours (or five days) of sick leave to accrue per year. MASS. GEN. L. ch. 149, § 148C(d) (2015); OR. REV. STAT. § 653.606 (2015). Vermont's law, which went into effect on January 1, 2017, allows employees to accrue one hour for every 52 hours worked, up to a maximum of 24 hours a year until December 31, 2018, and up to 40 hours per year after that date. See 2016 Vt. Legis. Serv. 69 (West). In addition to these state policies, a number of cities across the country have also adopted paid sick leave policies in recent years. For a summary of these laws, see COUNCIL OF ECON. ADVISORS, *supra* note 17, at 20–21.

316. See *supra* notes 314–15.

through employee payroll contributions.<sup>317</sup> For example, California's law states that its paid family leave program "shall be a component of the state's unemployment compensation disability insurance program, shall be funded through employee contributions, and shall be administered in accordance with the policies of the state disability insurance program."<sup>318</sup> New Jersey states that its "family leave program is financed 100% by worker payroll deductions. Employers do not contribute to the program."<sup>319</sup> Rhode Island and New York's plans are similarly financed through employee contributions.<sup>320</sup>

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317. Employers have reason to be concerned about costs. With unpaid leave, costs are relatively minimal as the uncompensated nature of the leave presents a substantial deterrent to its use, particularly for low-wage workers. One would expect the number of users to increase with a system of paid leave. In addition, with unpaid leave, employers are required to shift employees to cover the functions of absent employees and perhaps in some circumstances to hire temporary help. In a paid leave system, employers would incur these costs in addition to the costs of having to pay the salaries of those who are absent from the workplace. Some employers may be concerned that these additional costs, combined with a larger number of users, could be substantial, and that the costs may not be offset by the benefits that accrue to employers from increased employee satisfaction.

Some might argue that employers should be required to view the additional costs as a part of doing business and should simply pass on the additional expenses to customers by raising the price of goods. According to this argument, everyone will pay a little more for goods and services. This may be a reasonable price to pay given that the additional costs support public benefits such as producing healthy families and minimizing the disparate effects on women of human reproduction and childrearing. Not even the most progressive proposals, however, place the full costs of these programs on employers. Hillary Clinton stated that her proposal for 12 weeks of paid leave would have been funded through tax increases on the wealthy. *Paid Family and Medical Leave*, *supra* note 302. The FAMILY Act would require that employers and employees pay into a government fund similar to Social Security. Berman, *supra* note 302. Donald Trump's proposal, which is more modest, would be funded through savings from fraud reduction in the existing unemployment insurance program. See DONALD J. TRUMP FOR PRESIDENT, *supra* note 306, at 5.

318. CAL. UNEMP. INS. CODE § 3300(g).

319. *Cost to the Worker*, STATE OF NEW JERSEY, DEP'T OF LAB. & WORKFORCE DEV., <http://lwd.dol.state.nj.us/labor/fli/content/cost.html> (last visited Feb. 5, 2017) ("Starting January 1, 2016, each worker contributes 0.08% of the taxable wage base. For 2016, the taxable wage base is the first \$32,600 in covered wages earned during this calendar year, and the maximum yearly deduction for Family Leave Insurance is \$26.08. The taxable wage base changes each year.").

320. R.I. DEP'T OF LABOR & TRAINING, TEMPORARY CAREGIVER INSURANCE (2014), <http://www.dlt.ri.gov/tdi/pdf/TCIBrochure.pdf> (stating that Rhode Island's temporary caregiver insurance "is financed entirely by employee payroll deductions"); Crockett, *supra* note 299 (explaining that New York's program will be funded solely by employee payroll contributions, with no contributions from employers or taxpayers).

Costs have also been reduced in other ways.<sup>321</sup> For example, costs associated with paid *family* leave have been decreased by only partially reimbursing wages for missed days at work and by requiring that employees use accrued vacation and personal sick leave before using family leave.<sup>322</sup> The costs of paid *sick* leave have been reduced by, for example, implementing an accrual system and by limiting the total number of hours of available paid sick leave. States have also mandated that paid leave operate concurrently with leave under the FMLA, thereby minimizing the length of an employee's absence from the workplace. With measures like these in place, early evidence indicates that the costs associated with paid leave in these states are not nearly as high as employers feared they would be.<sup>323</sup>

The good news from the foregoing analysis is that models for successful legislation exist.<sup>324</sup> The bad news is that the nine states to

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321. One must, however, be careful to consider the effects of certain restrictions on low-wage workers. For example, limitations based on "employer size" and "hours worked" are less desirable as low-wage workers tend to be well represented in small businesses and in part-time work. See *supra* notes 88–95, 105–07 and accompanying text.

322. See, e.g., CAL. UNEMP. INS. CODE § 3303.1(c) (permitting employers to require employees to use up to two weeks of unused vacation before receiving family leave benefits).

323. See THE COST OF DOING NOTHING, *supra* note 18, at 29 (conceding that extending benefits may cost employers more, but countering that the benefits to the employer of retaining the best skilled and cared for workers makes up for these costs); COUNCIL OF ECON. ADVISORS, *supra* note 17, at 16–18 (same).

324. To be sure, setting up a federally-administered fund would require a level of detail that exceeds the scope of this Article. However, the government has at least two possible models from which it may draw. The first would be a system of shared responsibility between the federal government and the states similar to unemployment insurance. See *State Unemployment Insurance Benefits*, U.S. DEP'T OF LAB., EMP. & TRAINING ADMIN., <http://workforcesecurity.doleta.gov/unemploy/uifactsheet.asp> (last visited Jan. 25, 2017). The second would be a central fund that would be administered by the federal government, like Social Security. See Berman, *supra* note 302. An advantage of the second approach is that it ensures that benefits are relatively uniform across the states. See ECON. REPORT TO THE PRESIDENT, *supra* note 15, at 200. A disadvantage of a centrally administered system is that it would require constructing a new mechanism for collecting and distributing funds. A new mechanism may be difficult to create and, given existing levels of governmental bureaucracy, inefficient to operate.

In addition to paid leave laws, other legislative vehicles might encourage employers to afford greater benefits to low-wage workers. For example, a number of provisions in the federal tax code allow for the tax-free treatment of certain employment benefits only if the benefits are provided on a nondiscriminatory basis. (Nondiscriminatory in this context means without regard to the rate at which employees are paid.) See, e.g., 26 U.S.C. § 125(c) (2012) (cafeteria plans); § 132(j)(1) (fringe benefits); § 414(v)(4) (pensions). Consideration might be given

act are among the more socially progressive and liberal states in the United States. Convincing other, more conservative states to follow will be no easy feat given a strong employer lobby and the declining influence of unions.

In closing, federal legislation is necessary to maximize the possibility that all workers will have access to some minimum level of benefits. While such legislation would be a substantial improvement, it bears remembering that legislation is not a complete solution to the benefits gap. Legislative action is well-suited for benefits like family and sick leave because employers can implement these benefits across the board, regardless of the type of business or work being performed. However, other FWAs (e.g., flexible arrival and departure times, compressed work weeks, part-time work, schedule swaps, job sharing, telecommuting, flexible scheduling of breaks, the use of lunch in exchange for early departures, banking time to secure future time off) lie uniquely within the province of employers and require consideration of particular workplace circumstances. In addition to legislation, what is needed is a cultural shift, where employers value their employees. The problem is that few structural mechanisms exist to encourage employers to move beyond their current commitments. And workers, in a context where the supply of workers exceeds the demand for their labor, are ill-equipped to advocate individually on their own behalves.

#### CONCLUSION

The benefits gap in the United States is alarming. Low-wage workers, who face the same (or more) work-life challenges as high-wage workers, receive less workplace flexibility and fewer employment benefits than high-wage workers. Although studies show that FWAs and workplace benefits produce positive returns for employees, employers, and the general society, employers may be loath to extend these benefits to low-wage workers due to cost concerns and a surplus of low-wage workers in the labor market. In addition, negative class stereotypes and bias concerning the skill and value of low-wage labor may affect employer decision making and the willingness of other interveners to act.

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to expanding these categories and the covered benefits. One advantage of using the tax code in this way is that it provides incentives for high-wage workers to care about low-wage workers. To keep their benefits (or at least their favorable tax treatment), these benefits would need to be extended to low-wage workers.

This Article suggests that overcoming these hurdles is a near impossible task in the current political and economic climate, particularly with the decline of organized labor and the arrival of the Trump era. With conservative Republicans in control of the Presidency, both houses of Congress, and many state legislatures, very little legislative action is likely to occur. Absent legislation, employers will not be pressed to reconsider their treatment of low-wage workers. Thus, 25–35% of the U.S. labor market will continue to work without workplace flexibility and without basic benefits like paid family leave and paid sick leave. The fact that other developed nations, and several U.S. states, have been able to provide greater benefits for workers across the board suggests that the benefits gap reflects a lack of social and political will, rather than structural impossibility.